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Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1214~~ 70-202

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SEPARATE APPENDIX

Federal Trade Commission Order, Opinions, Initial Decision and Complaint

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May 1971

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Final Order

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

DOCKET No. 8663

In the Matter of

BEATRICE FOODS CO., a corporation, and
THE KROGER CO., INC., a corporation.

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision and upon briefs in support of and in opposition to said appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and denied in part,

IT IS ORDERED that respondent The Kroger Co., Inc., a corporation, and its officers, representatives, agents and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the

amended Clayton Act, of fluid milk and other dairy products, for resale in outlets operated by respondent, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

IT IS FURTHER ORDERED that the complaint herein against respondent Beatrice Foods Co., be, and it hereby is, dismissed for the reasons stated in the accompanying opinion.

By the Commission. Commissioners Dixon, Elman and MacIntyre dissented in part and concurred in part; and Commissioner Nicholson dissented from the order against respondent Kroger and concurred in the dismissal of the complaint as to respondent Beatrice.

/s/ JOSEPH W. SHEA
Joseph W. Shea
Secretary

SEAL

ISSUED: December 1, 1969

Attached are: (1) Opinion of the Commission by Commissioner Jones

Final Order

(2) Separate opinions by Commissioners Dixon and MacIntyre dissenting in part and concurring in part

(3) Dissenting opinion by Commissioner Elman setting forth his reasons why the complaint should be dismissed against both respondents Beatrice and Kroger

FT:4

Opinion of the Commission

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In the Matter of

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By Jones, Commissioner:

I

This case is before the Commission on appeal by complaint counsel from the hearing examiner's initial decision dismissing the complaint. Count I of the complaint alleges that Beatrice Foods Co., beginning in June 1962, violated §2(a) of the Robinson-Patman Act by discriminating in prices in the sale of fluid milk and other dairy products to The Kroger Company, Inc., the Great Atlantic & Pacific Tea Co. and certain other customers at lower prices than it sold products of like grade and quality to other retail customers. Count 2 of the complaint alleges that Kroger

violated §2(f) of the Robinson-Patman Act in negotiating with Beatrice for a supply of fluid milk and other dairy products under private label brand to stores of Kroger's Charleston, West Virginia, Division by knowingly inducing and receiving illegal discriminatory prices. By stipulation the parties agreed that the time period within which the discriminations to Kroger are claimed to have occurred is limited to June 1962 through October 1963. The discriminations to A & P are claimed to have occurred between October 1962 and October 1963.

After a lengthy trial and compilation of a voluminous record, the hearing examiner dismissed all charges. As against Beatrice he found no proof of injury at either the primary or secondary levels of competition. He found further that Beatrice had established a good faith meeting of competition defense under §2(b) of the Robinson-Patman Act. While stating that it was unnecessary to his decision, the hearing examiner went on to find that an elaborate cost study introduced in evidence by Beatrice was not sufficiently reliable to be accepted as a cost defense.

As against Kroger the hearing examiner dismissed the complaint because of the asserted failure of proof of the charges against Beatrice, and on the further ground that there was no evidence that Kroger knew or had any reasonable basis to believe that the prices offered to it by Beatrice were not in fact cost justified or were not offered in good faith to meet an equally low price of a competitor.

On the appeal complaint counsel challenges all of the hearing examiner's findings in support of dismissal. In addition complaint counsel urges that the examiner should have made further findings as to the unreliability of Beatrice's cost study. Beatrice affirmatively raises the lat-

ter issue by urging that its cost study was valid and sufficient to support a cost justification defense.

The charges in this complaint are bottomed on an agreement between Beatrice and Kroger under which Beatrice supplied Kroger with private brand fluid milk and other dairy products in certain areas of West Virginia, Ohio and Kentucky, serviced by Kroger's "Charleston Division." This contract, which was negotiated in the early months of 1962 and which went into effect in June of that year, provided for sales of private label dairy products at prices determined by application of a formula to raw milk costs reflected by a Federal Milk Marketing Order covering Huntington, West Virginia. The prices finally arrived at in the course of the negotiations were stated in terms of specific dollar amounts, but, unlike prices charged by Beatrice to other customers, which were based on a list price less a percent discount, the prices to Kroger were intended by the parties to vary from month to month in accordance with the Federal Milk Marketing Order. Also, unlike Beatrice's sales to others, sales to Kroger were to be made on a "stripped service" basis whereby Kroger personnel performed all of the functions in the nature of in-store services that Beatrice' route salesmen otherwise performed. The claimed saving to Beatrice of the expense of these services lies at the base of the attempted cost justification defense.

The case presents important Robinson-Patman questions, particularly with respect to the meeting competition defense and cost justification, in the context of a negotiated private label agreement between a major interstate supplier of dairy products and a large grocery store chain.

Opinion of the Commission

The specific issues to be decided here are: (1) whether the prices resulting from the application of the terms of the Beatrice-Kroger agreement were sufficiently different from prices paid by other customers of Beatrice to amount to unlawful discriminations; (2) whether the evidence shows the requisite degree of primary or secondary line injury; (3) whether lower prices to Kroger were offered by Beatrice in good faith to meet competition; (4) whether any price differential which did exist has been successfully cost justified and (5) whether Kroger knowingly induced or received unlawful discriminations. Certain additional questions, including whether Beatrice granted unlawful discriminations to A & P, are also to be decided.

II

1. *The Respondents*

Beatrice is the third largest dairy company in the country in terms of gross annual sales. Beatrice's sales were $539,192,494 in fiscal 1962 and $569,487,854 in fiscal 1963. The headquarters of the company is in Chicago. Through its operating dairy divisions it operates 134 plants in 33 states which manufacture and process fluid milk, products processed from fluid milk (such as whipping cream and half and half) and products manufactured from milk (including cottage cheese, which plays some part in this case). The basic ingredient in all of these products is raw milk, which is procured at the plant level by Beatrice from the producers and purchased in cans or tank truck lots. After processing and manufacturing, the dairy products are either distributed by route trucks operating directly out of the Beatrice plants or moved by trailer truck to distribution

branches and then loaded on route trucks and delivered to customers.

Beatrice sells directly to a diversity of customers including restaurants, institutions, the Government, and the consumer by home delivery. But for purposes of this case the significant class of customers is retail grocery stores, consisting of all sizes of independent grocery stores as well as supermarkets and chain stores.

Nationally, Beatrice's primary brand name is "Meadow Gold" but in some local areas Beatrice has continued the use of brand names of dairies formerly acquired by it. Thus Beatrice used the brand "Greenbrier" in the areas served by its Greenbrier Dairy plant in Beckley, West Virginia.

Each Beatrice plant operates with a degree of autonomy and makes basic management decisions in response to local conditions. However, the various operating plants and outlets are organized on district and regional levels, and certain activities, including the negotiation and formalization of major contracts, are supervised above the district level or at the national level.

This case involves three Beatrice plants, all of which lay within Beatrice's Appalachian District. Two of these, plants at Beckley and Clarksburg, West Virginia, produced the fluid milk products involved in this case. A third plant at Sandy Lake, Pennsylvania, manufactured cottage cheese which was shipped to the West Virginia plants for distribution to the Kroger stores.

Kroger operates a chain of retail grocery stores which sell a variety of products to the consuming public, including fluid milk and other dairy products. In 1963, Kroger had over 1,400 grocery stores in at least 19 states. Its national

sales exceeded $2 billion. These grocery stores were operated through a number of divisions. Each division was the primary purchasing entity for the 30-100 stores served by it. Kroger's Charleston Division, which is the one primarily involved here, included a total of 44 Kroger stores located in central West Virginia around Clarksburg (the "Clarksburg area"), stores on both sides of the Ohio River in Ohio and West Virginia between Huntington, West Virginia, and Marietta, Ohio (the "River area"), stores in eastern Kentucky along the Kentucky-West Virginia border (the "Kentucky area"), and stores in four roughly contiguous areas of southwestern West Virginia centering around the cities of Logan (the "Logan area"), Charleston (the "Charleston area"), Beckley (the "Beckley area"), and Lewisburg (the "Lewisburg area"). Kroger's annual sales in these areas were estimated at $67 or $68 million in the period 1962-3 (Tr. 773). Kroger's dairy product sales in these areas amounted to approximately $2,000,000 annually (CX 88).

2. *The Nature of the Market and Competition Therein*

The hearing examiner properly found that each of the seven market areas in Ohio, Kentucky and West Virginia comprising Kroger's Charleston Division was identifiable and therefore an appropriate market within which to determine the consequences of price discriminations. The hearing examiner also properly found that only the five West Virginia areas centered around Beckley, Charleston, Clarksburg, Lewisburg, and Logan need be considered here in terms of the existence or consequences of price discriminations. The River area is excluded, at least as to

secondary line competition, because Beatrice had no customers there other than Kroger. The Kentucky area is excluded since Kentucky purchases by Kroger were regulated under local milk pricing law.

Of the five West Virginia areas by far the most important was Charleston, which contained 11 of the total of 44 Kroger stores with more than a third of the annual volume of the entire Charleston Division (see CX 141, 88C, 90M).

In 1962 and prior thereto, Beatrice was one of several dairies serving the various areas within Kroger's Charleston Division. Beatrice itself was selling its brand name products in all areas with the exception of the River area, but had the potential to supply the Kroger stores in that area also. Two of Beatrice's competitors, Fairmont Foods Company, and Broughton's Farm Dairy, Inc., had distribution systems capable of supplying all the stores in the Charleston Division. In addition, The Borden Company sold in certain of the areas and had the potential to serve a major portion of Kroger's needs from its plant in Huntington, West Virginia. A fifth company, Valley Bell Dairy, had the potential of serving at least a majority of the stores in the Charleston Division and, for a time was considered to be a potential competitor for the Kroger business.

Looking at the nature of the market on the buyer level, there were numerous submarkets in Kroger's Charleston Division within which Kroger stores competed with other large grocery chains (such as A & P and Garden Fresh Markets), smaller regional chains, and independent supermarkets and local groceries of various sizes.

Opinion of the Commission

Overall, Kroger was the largest marketer in its Charleston Division and a significant factor in each submarket area where it had stores.

Prior to 1962, at which time the discriminations here involved started, private label dairy products were not sold in the market areas involved here. Many of the super markets and chains carried two or more of the name brands of the various dairies serving an area. In many of the Kroger stores, for example, four or five such brands were displayed in the dairy cases, attended by a similar number of route men from the dairies making deliveries and serving the stores. In this period most customers in this market received what was referred to as the "full service" method of milk distribution whereby it was the responsibility of the route man for each dairy to move the milk from his truck into the dairy case of the customer, to rotate the old milk to the front of the case and to fill the case with new milk. In addition, the route man was frequently required to devote time to matters of ordering, invoicing and billing. In the case of Kroger, testimony showed that route men sometimes had to return to the stores several times a day just to be sure that the dairy cases were kept supplied with a full line of products (Tr. 715).

Prices of dairy products to retailers had tended to be based on fairly stabilized list prices with generally recognized discounts, including volume discounts to large purchasers. The list prices and actual prices varied from area to area with lower prices predominating in the western areas of West Virginia near the Ohio River and higher prices appearing in the more mountainous areas to the

south and east.[1] In the Clarksburg area in the central part of the state prices tended to be between the extremes in other areas.

By early 1962 a certain amount of price cutting by local dairies, particularly in the Charleston area, had begun to erode the traditional price structure (Tr. 377-8, 778). In addition, starting in 1962 innovative delivery and service techniques began to appear in the market. The larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk, instead of discounts from list price, in exchange for limited or no in-store service on the part of the selling dairies. This was accompanied by private branding of dairy products in supermarkets and chains, and finally, vertical expansion of at least one major chain, Kroger, which built its own dairy in Springfield, Ohio and began to supply its own label needs in 1966 (Tr. 566-7).

Thus this case involves alleged price discriminations against a background of a changing market and "modernization" of the distribution of dairy products. The food chains were the prime movers in this change, not the dairies. Certainly in the case of Kroger's private branding, it was the buyer who initiated this important market changed by importing a technique, already used in divisions of the company in other areas of the country, into the area served by Kroger's Charleston Division.

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[1] For Beatrice, adherence to the traditional list price meant that milk products produced at the Greenbrier plant in Beckley were sold at higher prices in the adjacent mountainous areas than in, for example, Charleston which was 50 miles to the north and west of Beckley. This pricing anomaly will become particularly significant upon consideration of the possibility of cost justification of the differentials between prices charged by Beatrice to Kroger and competitors of Kroger.

3. *Kroger's Plans for Private Label Dairy Products*

In November 1961, the grocery merchandiser of Kroger's Charleston Division contacted Mr. Francis X. Casserly, Manager of Kroger's Dayton, Ohio, dairy plant and grocery merchandiser for Kroger's Columbus Division, to inquire about the private label milk program that the Columbus Division was then operating with Broughton Dairy in Ohio. As a result of that discussion, a plan was developed for private label milk in the Charleston Division. Mr. Casserly, due to his prior experience with such matters, was designated to negotiate with the various dairies having the potential of serving the Charleston Division. It is these negotiations, and the conduct of the parties to them, which gives rise to the good faith meeting of competition defense in this case and also to Kroger's asserted violation of §2(f) in inducing unlawful discriminations.

Kroger was prompted to make this move in part because of its desire to avoid what is regarded as the "nuisance" involved in the traditional route men's servicing of the retail dairy outlets (Tr. 715; *supra*, p. [O-11*]). In addition, some Kroger stores carried brands that were not sold in a majority of the stores in the Charleston Division. The large number of suppliers, together with the absence of a division-wide brand, discouraged Kroger from effective advertising of dairy products. Finally, Kroger representatives testified that the prices which Kroger had to pay under this system were too high to permit it to compete

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[* References to the reproduction of the Commission's Opinion in the Appendix are designated O— and placed in brackets]

profitably with local price cutters who had become active in certain areas of the Charleston Division (Tr. 685-6, 715-16, 778-9, 784-5).

The Kroger officials decided that the system should be revised so that Kroger carried only the new Kroger label and one other brand of milk in each store, with the high-volume item, homogenized milk in gallon jugs, available solely under the Kroger label and with Kroger label merchandise being given preferential space in the dairy cases of each store (Tr. 629-30, 685-7, 715).

At the outset Kroger had only a general idea as to the type of arrangement it wanted. The details were not spelled out in advance but were evolved through negotiation and became incorporated in the various proposals made as time went on.

4. *The Preliminary Negotiations*

In late 1961, Mr. Casserly notified Valley Bell, Broughton, Borden, and Fairmont that Kroger was interested in receiving proposals for "bottling Kroger label milk" (Tr. 590-1; CX 100, 116, 133). He did not even approach Beatrice at this stage, although Beatrice was serving 26 Kroger stores in West Virginia with its own label dairy products, because it was known by Mr. Casserly that Beatrice milk was packaged in a certain type of container which was not satisfactory to him (Tr. 365-7, 369-71, 487, 591).

Mr. Casserly's first contact was with Broughton, which was selling its own label dairy products to a number of Kroger stores in the Charleston Division and was also the supplier of private label milk to stores in the Columbus

Division with which Mr. Casserly was already familiar (Tr. 590, 596, 943-6). Broughton, consequently being somewhat familiar with the prospective needs of Kroger, came forward with an early proposal. The proposal, dated January 6, 1962, was in the form of a tabulation (CX 103) showing proposed prices for Kroger label products to Kroger stores in various areas of the Charleston Division as compared with the prices which Kroger was then charging in those stores. The prices varied widely depending upon the store location. The covering letter stated that Broughton's proposed prices were based upon the "prevailing market discount plus an additional 7%", with certain exceptions.

Mr. Casserly in testimony characterized these prices as amounting to a discount of "an average 20 percent . . . a little above on some, a little below on others" (Tr. 694). In later negotiations he rejected price offers by other dairies, including Beatrice, stating to the dairy companies that he already had a proposal for prices of 20 percent off list on the strength of the Broughton proposal (Tr. 375, 487-8, 595-7, 702-3, 717-18).

This was not true.

The Broughton discount offer may have been as low as 20 percent off list for some items, but for the all important gallon jug of homogenized milk the resulting prices were substantially above the 20 percent off list level.

The Broughton offer was in the form of tabulations covering each Kroger store location and showing the existing retail price out of each store, the "prevailing wholesale price in the market", the proposed price for Kroger label

products and a percentage figure for Kroger's gross profit. The prices in the five West Virginia areas stated by Broughton for gallon jugs of homogenized milk, together with the stated "prevailing wholesale price" and the resulting discount as calculated by complaint counsel are as follows:

	Broughton Quote	Wholesale Price	Discount
Clarksburg	.7321	.83	11.8%
Charleston	.7497	.85	11.8%
Logan	.7914	.85	6.9%
Beckley	.8163	.98	16.7%
Lewisburg	.8163	.98	16.7%

(See p. 3 of Complaint counsel's reply brief to Kroger)

Complaint counsel's calculations show an average discount on gallons for all Kroger locations as stated by Broughton of a little less than 11%.[1]

[1] The figures shown by Broughton for gross profit to Kroger are somewhat different and could have been what Mr. Casserly referred to when he testified that Broughton "indicated discount off list price on this bid of up to 20 per cent" (Tr. 603), but by no stretch of the imagination would the 20 percent figure have represented a fair statement of the gross profit shown to Kroger on gallons. The gross profit figures for the five West Virginia areas as stated by Broughton were:

Clarksburg	16.81%
Charleston	11.80%
Logan	20.86%
Beckley	17.55%
Lewisburg	17.55%

(CX 103)

Opinion of the Commission

As previously noted, Mr. Casserly did not initially contact Beatrice at all. That contact came about in early January 1962 because Beatrice officials had heard rumors that Kroger was seeking private label milk. On January 2, 1962, Mr. G. C. Stollings, General Manager of the Greenbrier Dairy Division of Beatrice located at Beckley, West Virginia, telephoned Mr. Casserly to arrange an appointment with the latter. Mr. Stollings, together with Mr. Hugh F. Hutchinson, District Manager for Beatrice's Appalachian District, met with Mr. Casserly in Dayton on January 12, 1962. At that meeting Mr. Casserly explained that he had not contacted Beatrice because, upon visiting the market areas involved, he had observed that the containers used by Beatrice were not of the type which he wished to be used for Kroger label milk. The Beatrice representatives indicated that they had machinery available which could be moved to the Beckley plant to package milk in the type of containers desired by Mr. Casserly and that they were able and anxious to submit a proposal (Tr. 369-74, 486-8).

Prices as such did not play a significant role in the discussion at this first meeting. The Beatrice representatives were more interested in finding out about such matters as the volume of business of each Kroger store, the number of stores, the areas to be served and how they might be served by Beatrice's facilities (Tr. 372-3). The Beatrice representatives testified that they did have in mind a tentative offer of a 15 percent discount. Mr. Casserly stated, however, referring to the Broughton proposal, that he already had an offer of a 20 percent discount (Tr. 375, 487-8).

The Beatrice representatives also testified that they were concerned and disturbed to learn that a 20 percent discount had been offered (Tr. 375-6, 488) since such a discount was substantially in excess of what they had encountered previously, despite some local price cutting and despite the fact that list prices had been subject to some erosion in certain areas (Tr. 488-9). They determined that, if they were to pursue the matter further, they would have to find some means of cutting costs. They also considered the possibility of exploring a formula method of pricing—one which would be geared to their cost of milk rather than a discount from list price (Tr. 376-7, 489-90).

The possible use of formula pricing had certain advantages to both parties. From the point of view of the buyer a discount from list price left too much control in the hands of the seller who could vary the list price at will (Tr. 606, 628); from the point of view of the seller prices based on a formula geared to the cost of raw milk meant that the differential between such costs and selling price would be constant and predictable, whatever might happen to list prices as the result of localized price cutting (Tr. 490-1).

During December 1961 and early January 1962 Mr. Casserly also had preliminary discussions with each of the other dairies, as a result of which the nature of a specific proposal began to take shape. On January 18, 1962 he wrote to each of the dairy companies to report on the results of a study which he had made of the volume requirements of dairy products for the Charleston Division. He estimated that yearly sales of fluid milk products and cottage cheese for all of the Kroger stores in the territory would be slightly in excess of $2,000,000 (CX 88, 105, 117).

Mr. Casserly's letter of January 18, 1962 also indicates that he, as were the Beatrice representatives, was thinking

in terms of a form of reduced service which would cut distribution costs of the winning dairy. Mr. Casserly proposed that,

> ". . . these products at the present time would be delivered to each Kroger store on your transportation equipment. Merchandising and marketing functions are to be performed by Kroger personnel. Product specifications, billing and other details will be discussed at a later time."

The type of delivery proposed by Mr. Casserly was described as "stripped service." Under this method of operation the responsibilities of the dairy company's route men are limited to drop off delivery to each store. From that point on the operation, including stocking and maintaining the dairy cases, is entirely handled by the store's personnel. In addition, simplified ordering and billing procedures can be used and the usual liberal return privilege modified to suit the needs of the store.

Mr. Casserly's letter also showed that he had begun to think in terms of a formula price. The letter stated

> "If your price is based on the Class I price of milk, please include at least a two year experience of the Class I price upon which you are basing your price." [1]

[1] A price based on the Class I price of milk would be based upon the cost of milk under Federal Milk Marketing Orders representing the minimum price which dairy processors have to pay dairy farmers. These orders are promulgated by the U. S. Department of Agriculture on a monthly basis and vary from time to time and from place to place. The prices which dairy processors must pay depend on the use which they make of the milk. A Class I price, the highest price milk usage, is received for all milk that is used for fluid milk purposes (Tr. 377, 2465).

The Beatrice representatives met again with Mr. Casserly on January 25, 1962, in order primarily to discuss questions relating to a formula type of pricing and to define the terms of a limited service arrangement which would cut down on the in-store service performed for Kroger and reduce the cost of distribution (Tr. 379-83, 490-2).

At this meeting the discussion was primarily about matters other than price. The Beatrice representatives did, however, mention a price of 21 cents per pound for cottage cheese. Mr. Casserly had previously expressed particular interest in that product. He had indicated that he would like to improve sales of that product in the Charleston Division. According to Mr. Hutchinson, at the mention of the 21 cents per pound price Mr. Casserly "threw up his hands and said, you're out of sight" (Tr. 380; see also Tr. 491-2).

5. *The Formal Proposals*

In February and March, the negotiations bore fruit in the form of specific written proposals by Beatrice, Fairmont, and Borden, and a new written proposal from Broughton. Valley Bell, which was in the running up to this point, although it could not have supplied more than 29 of the 44 stores, formally withdrew, stating by letter that it was unable even to attempt a "cost justification" in the face of rising costs in its own operations. Valley Bell merely offered to continue selling to Kroger at the existing prices and expressed the hope for a continued relationship. The letter was not a bid for the private label business of Kroger (CX 137).

Opinion of the Commission

a.) *Beatrice's First Proposal*

The first formal proposal by Beatrice to Kroger consisted of a letter dated February 5, 1962, outlining the type of service to be provided and containing a price schedule (CX 27, 89). This proposal was presented personally by Mr. Stollings and Mr. Hutchinson to Mr. Casserly with a *blank* price list at a meeting in Dayton, Ohio, on February 9, 1962 (Tr. 386-9; 494-6; 668-9). Prior to the meeting the Beatrice representatives had inserted some prices on another copy of the price schedule, which was blank in the version furnished to Mr. Casserly. Mr. Hutchinson had this piece of paper in his pocket when he went into the meeting. The first price shown on that paper was a price of 71 cents for a gallon of homogenized milk, with prices for other products being derived from that 71 cents.

The Beatrice representatives testified as to how they arrived at the 71 cent figure. They said that by this point they had come to believe that their primary competition was not Broughton but Fairmont and that they understood Fairmont was offering or planning to offer a series of discounts from list price. This is what Mr. Hutchinson testified:

> "We knew from what Mr. Casserly told us previously that the Fairmont bid was a series of discounts beginning with what Kroger was then getting in a place or on an average of what they were getting in all places. We didn't know specifically which. And then we knew that a discount had been added for volume, private label, and things of that character, and we estimated that to be around 17 or 18 percent, but on top of that we were well aware of a cash payment by Fair-

mont to Kroger to support and pay for a television show which was then running in West Virginia, Charleston, I think it was and Mr. Stollings and I, being well aware of that, knew that that cost was probably five percent of the business that was being done with Kroger.

"So I knew in my own mind, Mr. Stollings knew in his own mind, that in addition to the discounts Kroger might then have been getting, together with the private label discount, the volume discount added, that there was another four or five percent that had to be added somewhere along the line to cover the cost of this TV show" (Tr. 390).

Mr. Hutchinson also testified:

"... we had arrived at that 71 cent price by taking the average of the gallon jug price from the extreme western end of this area to the extreme eastern end of it and the extreme northern portion of the area and arrived at some sort of an average price for the gallon jug and applied a discount of 17 or 18 percent, I don't remember the exact figure, to what we took to be the sort of mean average" (Tr. 389).

Mr. Stollings testified:

"... we arrived at that [the 71 cent price] by taking a real low price clear over on the western side of this area where you would run into normally low pricing, working back to the southeastern end of the territory where you are getting away from the dairy country and getting into higher pricing. Through this area,

through here, it was pretty much then wound up to be an average price of 85 cents.

"We knew from talking with Mr. Casserly that Fairmont was thinking in terms of quoting from a list price down. We knew that there were trade discounts in the area that were generally ten percent, some of them as high as fifteen percent.

"We further knew that there would be something incorporated for private label and volume discount in this. We further knew of a cooperative advertising arrangement between Fairmont and Kroger Company, but we felt that Fairmont would maybe quote somewhere in the neighborhood of 16 or 17 percent, so we deducted that 16 or 17 percent from an 85 cent jug price and came up with the 71 cents" (Tr. 494-5).

During the course of the meeting the discussion turned to prices and Mr. Hutchinson pulled out the copy of the price schedule which he had in his pocket. He stated that Beatrice was thinking in terms of 71 cents for gallons. Mr. Casserly summarily rejected the price. Mr. Hutchinson testified:

". . . I said, well, now, Mr. Casserly, on the gallon jug, which was the first item on the proposal, I said, we are thinking in terms of 71 cents, and he just shook his head and said, if that is all you have got to offer, you might as well go back home" (Tr. 389).

Mr. Stollings testified:

"Mr. Casserly told us right quick that the price was high and again reminded us of our first meeting where,

when we had asked him if he had any—if he would give us some idea as to where this pricing would be, and he told us of the 20 per cent Broughton price and he said, you don't have to be a very good mathematician to take an 85-cent average jug price and 20 per cent will show you that 71 cents is high" (Tr. 495).

Mr. Casserly himself testified as to the price quoted by the Beatrice representatives at this meeting:

"'. . . this price was somewhere in the neighborhood of 70 or 71 cents and I, with the Broughton bid that I had back in January, figured I already had the price of 71 cents and I indicated . . . we just were not interested in a price of 71 cents" (Tr. 669).

Mr. Casserly had not received any quotations at less than 71 cents per gallon for the West Virginia areas at this time. Indeed his testimony shows that his rejection of the 71 cent price was based on the early Broughton proposal which contained actual prices per gallon of slightly over 73 cents to more than 81 cents per gallon in the five West Virginia areas, as tabulated above.[1]

Although the Beatrice representatives mentioned only a single price figure of 71 cents, which they calculated and discussed with Mr. Casserly in terms of a discount from list price, the proposal which they presented to Mr. Casserly showed that the ultimate prices to Kroger would vary

[1] The Broughton quote did contain prices in the area of 66 to 68 for several towns in the Ohio River area (CX 103B, C, G) but the Kroger stores in those towns had less than 10% of the expected volume of dairy products for the entire Charleston Division (CX 88C).

according to a formula based on raw milk costs. The proposal stated:

> "This price is based upon the average annual Class I price established by Federal Order Number 5, Huntington Section, Year 1961. Your monthly price would raise or lower in an exact amount with the increase or decrease of the prices determined by the orders under which milk for your private label would be purchased" (CX 89D).

It is clear that at the February 9, 1962 meeting the Beatrice representatives were trying to find the price level necessary to obtain the Kroger business using what information they had available to them. It is also clear that Mr. Casserly's summary rejection of the 71 cent price was not based on any true appraisal of that price as compared with the earlier Broughton offer. He simply thought he could get a better price (Tr. 669).

In part at least Mr. Casserly's hope for lower prices was based on market conditions in the Charleston area. The Beatrice representatives testified that surplus milk was being brought in from Kentucky by one local distributor and sold at low prices in Charleston (Tr. 378, 488, 497). Mr. Casserly knew of this local price cutting (Tr. 668). In addition there were rumors afloat that the Charleston market, which had not been subject to regulation, would soon come under a Federal Milk Marketing Order (Tr. 659, 668, 2804-5; CX 137A).[1]

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[1] The latter factor created a degree of uncertainty for the dairies such as Fairmont, Valley Bell and Broughton, which drew at least part of their milk supplies from the Charleston

Subsequent to the Beatrice submission on February 9, 1962, Mr. Casserly received formal bids from Broughton, Fairmont, and Borden.

b.) *Broughton's Proposals*

The second Broughton proposal, dated February 12, 1962, stated formula prices depending upon whether delivery would be made out of Broughton's Marietta Ohio, or Charleston West Virginia, plant (CX 106). The Marietta prices were geared to the Federal Milk Marketing Order applicable to that area using a stated constant figure to cover processing, bottling, delivery and profit. Based on information for the month of January 1962, Broughton stated a price of $.7077 for a gallon for Marietta milk. The Charleston prices, not being under Federal regulation at that time, were based on the non-regulated Charleston Producer Price, resulting in a Broughton quote for a gallon of homogenized milk, based on that price for January 1962, of $.7224.

In early March Broughton submitted revised schedules for this same cost-plus proposal which, for the most part, merely reflected use of March 1962 raw milk prices. These showed for gallons delivered out of Broughton's Marietta

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area (See CX 106, 137; Tr. 2798-9). Beatrice, however, since it drew its milk supply from the area around Beckley, was already regulated under the Huntington, West Virginia order (Tr. 401-2).

Ohio plant a price of $.6586 and out of its Charleston West Virginia plant a price of $.6879 (CX 112).[1]

c.) *The Fairmont Proposals*

On about February 22, 1962, Fairmont made its first formal proposal to Kroger (Tr. 621-2; CX 119-22, 125 & 126). The prices stated were based on a series of discounts[2] from list prices applicable in the various areas and included a 2 percent cooperative advertising allowance on private label products similar to the allowance which Fairmont had been giving on its own label products. The prices for gallons ran as low as $.6205 in Parkersburg, West Virginia, to $.8613 in some parts of Kentucky. In the five West Virginia areas primarily involved in this case the prices quoted by Fairmont were—

Clarksburg	.7302
Charleston	.6585
Logan	.7987
Beckley	.8168
Lewisburg	.8168
	(CX 125D, E, F, K)

In addition, Fairmont advised Kroger that if a responsible supplier offered lower prices, Fairmont would meet such prices on the same terms provided that it could make at least a 5 percent profit (CX 125B).

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[1] The reduction in gallon prices from Broughton's prior proposal was entirely due to use of lower raw milk costs for March 1962 and not to any change in the "constant figure." Some of the prices on processed and manufactured products, however, appeared to reflect other reductions.

[2] These discounts were stated in terms of a local trade discount of 5 or 10 percent, depending upon the area, plus a "cost differential" of 5½ percent on milk and 9½ percent on cottage cheese.

Opinion of the Commission

After meeting with Mr. Casserly in late February Fairmont revised its proposal. Its second submission in early March, 1962 repeated the offer of the same series of discounts off list price but there was added what Fairmont characterized as a "custom processing and delivery" alternative based on fluctuations in the cost of raw milk (Tr. 662; CX 123, 124, 127, 128). The prices shown for the latter were, in general, substantially lower than prices under the discount schedule. Fairmont stated that the cost of milk used was "the Market Administrator's forecast of the paying price for March, 1962" (CX 124A). On this basis Fairmont quoted prices as low as $.6007 per gallon in the River area. Prices for the five West Virginia areas were:

Clarksburg	.7255
Charleston	.6526
Logan	.6533
Beckley	.6526
Lewisburg	.6526[1]

(CX 123)

Fairmont stated that its figures were built up by adding to raw milk costs: production costs, transportation costs from plant to distributing branches, costs of receiving, storing and shipping for each plant and distributing branch, distributing expenses and a "surcharge" (CX 124B).[2]

The Fairmont proposal stated that this cost differential was based "on nine months actual experience" and could be "passed on to Private Label purchasers" (CX 125).

[1] Fairmont did not state a separate price for Lewisburg but its prior submission indicated that it considered Lewisburg to be part of the Beckley area (CX 122, 125E).

[2] The surcharge was stated at 2 cents per gallon for processing and 1 cent per gallon for delivery of milk, and .1 cent per pound for processing and $\frac{1}{2}$ cent per pound for delivery of cottage cheese.

Opinion of the Commission

It is clear that Fairmont hoped to take advantage of the cost justification defense to justify its low prices to Kroger. The record even contains memoranda of law which Fairmont had prepared by its attorneys discussing the question of cost justification (CX 118). Copies of these memoranda were submitted to Mr. Casserly by Fairmont in early February and the cost justification question discussed with him by Fairmont representatives[1] (Tr. 628-9, 630-1, 674, 641-2, 803).

d.) *The Borden Proposal*

One other offer was received by Mr. Casserly prior to the final negotiations with Beatrice. Under date of March 9, 1962, Borden submitted three alternative plans (CX 97). The first plan envisioned pickup by Kroger of both Kroger brand and Borden brand products from Borden's Huntington, West Virginia, plant. The prices stated were substantially below those offered to Kroger by any other

[1] The Fairmont proposal was stated in terms of a service contract whereby Fairmont would process and package *Kroger* owned milk and deliver it to Kroger stores. The hearing examiner, on the other hand, treated the Fairmont proposal as a proposal for an ordinary contract of sale. Fairmont obviously wished to state its offer in terms of a service contract for the argument that it would have in the event of a Robinson-Patman challenge. All the evidence is clear that Fairmont was trying very hard to protect itself against Robinson-Patman problems. Whether it could do so merely by the device of having title to the raw milk taken by Kroger instead of Fairmont, we need not decide since, in any event, Fairmont was not selected as the supplier to Kroger. Whatever the nature of the Fairmont proposal, however, Beatrice was entitled to avail itself of the good faith meeting of competition defense to try and meet that offer. As subsequent events show, this is what Beatrice tried to do, without knowing the precise nature of the Fairmont offer.

dairy, but, of course, would have entailed additional expenses to Kroger to handle its own distribution as well as its in-store service.

The second plan offered by Borden was on a cost-plus basis for drop delivery by Borden at 28 Kroger stores. Different prices were stated for four specified areas. All the prices were based on the Huntington, West Virginia, Federal Milk Marketing Order using the March, 1962 price and were designed to fluctuate in accordance with that price. To this price Borden added its calculated costs of delivery to the various areas which it proposed to serve.

The third Borden plan contemplated "store-door delivery" which included full in-store service. Borden offered merely to give Kroger its highest volume discount under this plan.

The Borden plans are not comparable with any of the other bids considered by Mr. Casserly since Borden basically offered the alternatives of serving only a limited number of stores[1] or having Kroger perform all delivery functions by picking up the products at the Borden plant in Huntington, West Virginia.

e.) *The Second Beatrice Proposal*

We now come to the crucial negotiations between Kroger and Beatrice on which must ultimately depend Beatrice's good faith meeting of competition defense and the liability of Kroger for inducing unlawful price discriminations.

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[1] The second and third Borden plans did not include delivery to any Kroger stores in the Clarksburg, Beckley or Lewisburg areas. Borden's drop delivery price based on the March, 1962 Huntington Order for Charleston was $.6515 for gallons of Kroger label milk and for Logan was $.7340.

Opinion of the Commission

On March 14, 1962, Mr. Stollings and Mr. Hutchinson again met with Mr. Casserly. Mr. Casserly still had before him the Beatrice proposal which had previously been submitted in February with a blank price sheet. He had not received any specific price offers from Beatrice on fluid milk except the verbal offer of 71 cents per gallon made at the February meetings which he had rejected out of hand.

The Beatrice representatives, however, came armed with a price schedule based on a 68 cent per gallon price. This price was exactly a 20 percent discount from their computed "average" list price of 85 cents. Both representatives testified that this figure was selected because Mr. Casserly had indicated many weeks before that he had received an offer of approximately a 20 percent discount from Broughton (Tr. 411, 497).

At the meeting Mr. Casserly immediately indicated that he did not consider the 68 cent price to be good enough. According to Mr. Stollings, he mentioned that he had received a bid from Fairmont which was better than this price and also mentioned the fact that prices were deteriorating in the Charleston market (Tr. 497).

At this point the testimony of the participants in the meeting becomes conflicting. Mr. Hutchinson testified that Mr. Casserly, independent of anything said by himself or Mr. Stollings, inserted a price of 66 cents on the blank price sheet attached to the submission of February 9 (Tr. 412-13). Mr. Stollings and Mr. Casserly testified that Mr. Stollings, after some conversation, quoted the 66 cent price (Tr. 497, 720). Whoever first mentioned the 66 cent price, the testimony is undisputed that Mr. Casserly took that figure and, on the spot, with the aid of a calculator con-

verted that figure to a formula based on raw milk cost. The resulting computation was typed up and attached to the Beatrice proposal (Tr. 412-13, 498-9, 733-4; CX 89N). It shows that, in accordance with the terms of the proposal, actual prices paid by Kroger were to be based upon the average Huntington, West Virginia, raw milk cost for the year 1961. Using this figure, plus other fixed costs, Mr. Casserly calculated a "permanent differential" to arrive at a price of 66 cents per gallon. This permanent differential would then be added to the costs determined in accordance with the applicable monthly raw milk price to determine the actual price to Kroger for any given month. The prices for cottage cheese products, however, were not subject to the formula.[1]

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[1] The following reproduces the calculation sheet in its entirety:

"To determine milk cost take the Huntington Class I price and adjust to 3.6%. Add 1% for plant loss and .04% cwt. market administration fees. Divide by 11.6 to get cost per gallon.

"*Example*—

Average 1961 Class I (3.6%)		$4.938
(Avg. Cl I 3.5%	4.865)	
(Diff.	.073)	
(	$4.938)	
1% Plant Loss		.05
Administrators Fee		.04
		$5.028
Divide by 11.6		43.35¢ cost per gal.

"To determine differential for gallon jug, subtract 43.35 from 66. equals 22.65¢ (permanent differential).

"To determine differential on half gallon homo subtract 21.67 from 37.8 equals 16.13¢ (permanent differential).

"Cheese price does not change from month to month."

(CX 89N)

Opinion of the Commission

The cottage cheese items, although not of significant volume compared to the fluid milk products which Kroger was seeking, presented problems for Beatrice.[1] After Mr. Casserly had indicated some interest in January in these products, but had rejected out of hand the 21 cents per pound price mentioned by the Beatrice representatives, Mr. Stollings conducted a specific investigation of cottage cheese prices. He found that Fairmont had sold cottage cheese to West Virginia institutional accounts in small volume for as little as 16 cents a pound. He also realized that because of Fairmont's purchasing procedures, which permitted Fairmont to purchase under non-regulated formulas whereby the purchaser paid for butterfat content of raw milk and effectively paid nothing for skim milk from which cottage cheese is made, Fairmont had a distinct advantage over Beatrice, which purchased milk in the West Virginia area under a formula based on the price of raw milk (i.e., including the skim milk) (Tr. 380-1, 391-4, 401-3, 491-3).

By drawing on the resources of the Beatrice plant at Sandy Lake, Pennsylvania, Mr. Hutchinson was able to arrange to procure skim milk at a very favorable price to be manufactured into cottage cheese for distribution in West Virginia (Tr. 403-6). This investigation had been made prior to the first written submission to Mr. Casserly in February. At that time the Beatrice representatives stated cottage cheese prices based on 17.5 cents per pound (Tr. 407). When the parties met on March 14, 1962, that price remained the same and the formula computation drawn up by Mr. Casserly indicated that the price

[1] Annual sales of cottage cheese by Beatrice to Kroger were about $40,000 (RBX 132H).

of cottage cheese was to be constant and would not fluctuate according to the formula (CX 89N).

The proposal was not considered to be final by either party at the March 14, 1962, meeting. Mr. Casserly merely stated to the Beatrice representatives, after the calculations had been made on the basis of the 66 cent price, that he considered the proposal to be "competitive" with others that he had received (Tr. 497-8, 740). The Beatrice representatives made it clear that the proposal would have to be submitted to the company's Chicago office for review by counsel (Tr. 502). Accordingly, in early April Mr. Stollings went to Chicago and spent two days reviewing the proposal with Beatrice's house counsel and an accounting specialist (Tr. 251-2, 504-5, 2255-6).[1]

In the meantime, on March 26, 1962, Mr. Casserly addressed a letter to each of the four dairies that had submitted written proposals stating that a final decision had not been made (CX 91, 99, 110, 129). He noted "the milk pricing situation has been in a very fluid condition in Charleston, and the recent revisions of practically all of the bids we received are requiring some time to evaluate totally the program." Mr. Casserly also noted that Kroger

[1] Mr. Stollings testified that during the course of this review the accountant was asked to "cost justify" the prices quoted to Mr. Casserly (Tr. 504). It is apparent, however, that no attempt was made at that time to cost justify the *differentials* which could be anticipated between the Kroger prices and the prices then being paid by other customers of Beatrice who were in competition with Kroger. That type of analysis, which will be discussed below, was not undertaken by Beatrice until late 1963 under the impetus of the Federal Trade Commission proceeding in this case (Tr. 1818; CX 25). The study which was made in Chicago in late March 1962 was for the purpose of determining the minimum profit to Beatrice to be expected from the proposed private label arrangement with Kroger (Tr. 2256-61; RBX 135F & G).

was considering bids based upon various milk cost formulas or a program allowing reductions from the established wholesale price with provision for promotional allowances.

The final negotiations with Mr. Casserly were conducted on the part of Beatrice by Mr. Stollings alone. Mr. Hutchinson did not participate because of illness. On April 9, 1962, Mr. Stollings met with Mr. Casserly and delivered to him a revision of the Beatrice proposal dated April 5, 1962, which had been approved by Chicago counsel (Tr. 2278; CX 28, 90). With respect to Kroger store locations in Ohio and West Virginia, the prices stated in the revision were the same as those discussed between the parties in March. That is to say the prices were based on 66 cents per gallon, upon which a permanent differential was calculated under the formula established by Mr. Casserly (for each item except cottage cheese) in terms of the Huntington, West Virginia Federal Milk Marketing Order average price for the year 1961. The precise language of the pricing provision in the revised version of the proposal is, in pertinent part, as follows:

> "... Our proposal is based upon a unit cost at our dock at our Clarksburg and Beckley plants plus an average cost per unit to deliver these products on our trucks to the store door of each of the forty-four stores in the West Virginia District on a four day per week basis.
>
> "The raw milk price is based upon the average annual Class I price established by Federal Order Number 5, Huntington Section, Year 1961. Your monthly price would raise or lower in an exact amount with the increase or decrease of the prices determined by

this Order under which milk for your private label would be purchased" (CX 90C).

The price for cottage cheese, as in the previous proposal, was constant and not subject to the formula.

Kroger accepted the proposal and the companies began to operate under it in June 1962. Prior to that, in May, Fairmont amended its March proposal by offering to reduce its quotations upon satisfactory proof that such reduction was necessary to meet a pricing schedule proposed by a competing supplier (CX 130). Kroger did not accept that offer. Shortly after that, Mr. Casserly informed Fairmont, Borden and Broughton that their proposals had not been accepted (CX 131).

III

1. *Comparison of the Proposals*

Much effort has been expended by the parties and by the hearing examiner to show, on the basis of a record which is sadly deficient on the subject, that the Beatrice proposal was or was not more favorable to Kroger than the other proposals, particularly the Fairmont "custom processing" offer which Mr. Casserly supposedly weighed with the Beatrice proposal in the last analysis.

We find that a meaningful comparison of the offers is difficult and cannot be made with indisputable accuracy. We find, however, the more persuasive and objective view is that the Beatrice offer was in fact lower in price, and that Beatrice, at least technically, did "beat" the competition. In any event, it is clear that the offer was accepted by Kroger because Kroger considered it, upon total evalua-

tion, including price factors, to be more favorable than the Fairmont "custom processing" or any other offer.

The analysis is made difficult and rendered imprecise by a number of factors:

First, the proposals covered a diversity of products to be provided over an undetermined time and in indefinite quantities. All of the proposals covered a variety of products including various types of fluid milk in different size containers, processed products and manufactured products. Although the gallon jug of homogenized milk was clearly considered to be the big item, there was no necessary or fixed relationship between the prices for gallons and for other products among the various proposals. In addition the price for cottage cheese was constant under the Beatrice proposal but would have fluctuated with raw milk prices under the Fairmont proposal (Tr. 740).

Second, the bases on which the proposals were made were dissimilar. Some were based on discounts from a list price, which was already subject to a greater or lesser degree of erosion depending upon the local area involved, and which bore no guarantee of permanence or stability; others were geared to various costs of raw milk which were continually changing and beyond the control of the bidders. Specifically, the Fairmont "custom processing" proposal was stated in terms of seven different prices based on forecast milk costs for March 1962 under three different Federal Milk Marketing Orders, plus unregulated milk costs in Charleston (CX 123, 124, 128; Tr. 639-40). The Beatrice proposal was based upon *average* raw milk prices during 1961 under a single Federal Milk Marketing Order and contained *uniform* prices to all Kroger stores in West Virginia.

Third, a static comparison of proposals, which by their nature were designed to vary over time and from place to place, cannot be made with precision without the benefit of hindsight. The mere fact that the Beatrice offer was based on an average while the Fairmont custom processing offer resulted in prices varying by as much as 12½ cents per gallon in different areas of West Virginia means that any precise comparison would have to await future sales results, and, as of March-April 1962, would have had to be based in part on projections of sales in the various areas. Furthermore, there would be no way of predicting with any degree of certainty whether fluctuations in the various Federal Milk Marketing Orders might make the uniform price offered by Beatrice on the basis of the Huntington, West Virginia Order end up by being more or less attractive to Kroger than the prices offered by Fairmont based on three different Orders.[1]

In order to make any meaningful comparison between prices governed by diverse raw milk costs it is necessary to convert them to a common denominator. Complaint

[1] We perceive another difficulty in making a meaningful comparison. These offers were made at different times in an inconstant market and the only one as to which the detail was ever filled in, as far as the record shows, was the final Beatrice offer. For example, the last Broughton and Fairmont offers included prices in the Kentucky areas which were far *higher* than the prices stated by the Beatrice representatives on March 14 as uniform throughout the Charleston Division. Yet the final Beatrice proposal reflected Kentucky prices *higher* than those proposed by Broughton and Fairmont because subsequent to March 14 Beatrice realized that its Kentucky prices would be subject to local regulation and thus not controlled by the negotiations. Thus comparison of the Broughton and Fairmont Kentucky prices based on either the 66 cent offer of Beatrice on March 14 or the final Beatrice Kentucky prices, which ranged from 65 cents to 93 cents and which were not subject to the formula, is meaningless.

counsel has performed this task by recomputing the Beatrice price in terms of the March 1962 Huntington Order using the "permanent differential" calculated by Mr. Casserly. On this basis the Beatrice price for gallons would have been $.6120 (see fn. 22 at p. 59 of complaint counsel's appeal brief). This price is obviously much more favorable to Kroger than any of the prices stated in Fairmont's "custom processing" bid except for Fairmont's price of $.6007 in the River area. Beatrice, however, maintains that the Fairmont bid price for Charleston should be reduced from the figure of $.6526 per gallon stated in Fairmont's final submission because just after the bid was submitted Charleston milk became subject to the Huntington Federal Order with a resultant reduction in prices paid to producers for raw milk in the Charleston area. Complaint counsel, on the other hand, vehemently argues that the Fairmont bid anticipated the lower cost of milk to Fairmont. Unfortunately, the record does not clearly establish which view, if either, is correct. Nor does it establish for the Fairmont bid a formula for computing the same kind of "permanent differential" that Mr. Casserly calculated for the Beatrice offer. The only precise method of comparison would be to compare such differentials (Tr. 724).

If we had to decide the matter precisely we would be inclined to accept complaint counsel's view that the prices stated in the Fairmont proposal did anticipate the lower cost of milk in Charleston under the new Federal Orders. Fairmont procured all of its milk in southern West Virginia under the unregulated Charleston Producers Price prior to March 1962 and could not have been ignorant of the competitive significance to it of an impending switch to the Federal Order, since it knew that the other bidders,

including Beatrice, were already procuring raw milk under the more advantageous prices established by Federal orders. Fairmont representatives participated in a meeting on March 6, 1962 at which the question of bringing the Charleston milk producers under the Federal Order was discussed (Tr. 2807). As a result of that meeting the Federal Order was put into effect as of March 12, 1962 (Tr. 2805). The Fairmont "custom processing" proposal was submitted at about this time, although the precise date is not established by the record. Nevertheless Fairmont did not make any move to change its offer after the switch to the Federal Order actually occurred in the Charleston area. Fairmont would surely have submitted new figures if its original figures had not allowed for reduced raw milk costs and, in fact, did submit changed figures covering only the Huntington West Virginia area by letter dated March 14, 1962 (CX 177; Tr. 634-5). Furthermore, Mr. Casserly by letter dated March 26, 1962 informed all bidders that he was considering changes in the various proposals, occasioned by "a very fluid condition in Charleston" with respect to milk pricing (CX 129). Thus Fairmont had ample knowledge of the cost changes and ample opportunity to change its prices. It certainly had incentive to do so; yet it did not. The only sensible conclusion is that the prices submitted in the Fairmont proposal were intended by Fairmont, and understood by Kroger, to constitute Fairmont's final bid.

Complaint counsel suggests that an exhibit which was excluded by the hearing examiner, CX 140, should have been admitted at least for the purpose of establishing that Kroger had reason to believe that the Beatrice proposal actually resulted in lower milk prices. The document (which

we have not looked at) is said by counsel to show the results of calculations made by Mr. Casserly's accountant who purportedly recomputed the Fairmont bid in terms of an average price for the year 1961 (presumably to show the Fairmont bid on the same basis as the Beatrice bid) (Tr. 636, 651). It appears from the record that Mr. Casserly, at the time, was provided with information as to the actual costs upon which the Fairmont prices were based but that that information was no longer in Mr. Casserly's possession at the time of the trial and was not otherwise available to be put into the record (Tr. 642-3).

The hearing examiner excluded CX 140 because the underlying documents showing raw milk costs and processing and delivery costs to Fairmont were not available (Tr. 652). Complaint counsel subsequently made an oral motion that the document be admitted for the purpose of showing Kroger's state of mind at the time of its acceptance of the Beatrice proposal. We believe that the document could have been admitted for that purpose, but we do not propose to reverse the hearing examiner on this point, since the facts on the record before us establish to our satisfaction that, for reasons including price factors, Mr. Casserly considered the Beatrice offer to be the best, and therefore he accepted it.[1]

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[1] Mr. Casserly actually testified that Beatrice "was the lowest and best bidder on this contract" (Tr. 739). The statement was made on cross-examination of Mr. Casserly by Beatrice's counsel, who moved that it be stricken as unresponsive to the question asked. The hearing examiner granted the motion. We think that the answer should have been allowed to stand, if for no other reason to show Mr. Casserly's state of mind, but find that in any event the record without the testimony amply supports our finding that Kroger accepted the Beatrice bid because it considered it to be the best bid.

Mr. Casserly testified that he did not make any immediate comparison of the bids because they were "quite complicated." He turned them over to his accountant who reported that there was very little difference between the Fairmont and Beatrice bids; that they were so close it was impossible on the basis of price of fluid milk to distinguish between them, and that the only significant difference was with respect to the bids on cottage cheese (Tr. 635-6, 721-2).[1] On that item Mr. Casserly stated that he considered the constant price offered by Beatrice as more favorable than Fairmont's fluctuating price. He did so despite the comparative insignificance of the dollar volume of cottage cheese.[2]

2. *Kroger's Conduct of the Negotiations*

Certain significant elements emerge with respect to Kroger's attitude and conduct of the negotiations.

First, Kroger's size and buying power put it at a distinct advantage over both of its competitors and its suppliers. It was the largest purchaser of dairy products in the area to be served. Its annual volume of such products was over $2,000,000, of which the potential private label sales represented a very large part. The dairy companies that

[1] Mr. Casserly also testified that there were non-price factors which inclined him toward Beatrice rather than Fairmont. Beatrice had the only certified testing laboratory in West Virginia and Mr. Casserly stated that he considered that Beatrice was a quality operation. He also thought that Beatrice was better organized to serve Kroger in the Kentucky area (Tr. 706-8).

[2] Ironically subsequent events proved that Mr. Casserly was wrong. Because of a decline in raw milk prices, Kroger's cost for cottage cheese during the period covered by the alleged discriminations would have been lower under the Fairmont price than under the Beatrice price (RX 132).

became involved in the bidding, on the other hand, were competing against each other for the existing business in a market which was deteriorating in some areas and where a cost squeeze already existed. They were each faced with the prospect of an all or nothing bid. The successful dairy would enjoy greatly increased sales to Kroger; the unsuccessful dairies stood to lose at least a major portion of the sales to Kroger that they previously enjoyed.

Second, Kroger brought in a special negotiator, Mr. Casserly, who was well experienced in private label operations while the officials representing the other dairies, except for Broughton, had no such prior experience.

Third, Mr. Casserly initially told each of the other dairies that he had a 20 percent discount offer from Broughton, which was a substantial distortion of the truth, and that he expected a better deal for the Charleston Division.

Fourth, Mr. Casserly, by his own testimony, was extremely uncommunicative about what other dairies were doing or thinking of doing, and even about what he himself wanted. He was clear, in his own mind, however, that he was out to get the best price he could. He testified as to his approach at the outset:

> ". . . what I was looking for wasn't really clear in my own mind and I think to this extent I may have confused the bidders to a certain extent. I felt that there was a net price somewhere, and I don't know what the net price was because I don't know the costs of these particular people who were competing, but I felt there was a net price which would represent a savings to the Kroger Company and a savings to the dairies who

were competing because of the large volume of business that we were offering to them" (Tr. 597).

He testified as to how he conducted the negotiations:

"Now, when I talked to each of the other companies, you had to spend a great deal of time explaining exactly what you had in mind. This idea of private label was—it seemed to be pretty new with them" (Tr. 591-2).

"Well, these were really a strange series of meetings. They would come in and there was a considerable amount of fencing going on and I know in my mind that I was convinced that they were trying to find out from me what other dairies were proposing or what prices they had come up with, if they had come up with prices.

"Now, one thing that I did indicate to them, and what I say for one dairy actually applies to all dairies because I tried as far as possible to say the same thing to everybody that I talked to, was that we had one bid based upon our experience in Columbus which was in the neighborhood of 20 per cent off list, and that I did not consider this adequate, that I believed that the discount, if the discount was read off list, should be greater than 20 per cent" (Tr. 595-6).

• • •

"Now, it is a strange thing, these people have ways of reading things into what you say and somebody may say that I communicated more, but as far as I was—from my end of the desk I wasn't giving out any information" (Tr. 596-7).

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Opinion of the Commission

"Well, generally what happened at these meetings, there were so many meetings it is hard to be specific about any one particular meeting, but these people were coming back and they were looking for more information about what we were talking about, about the type of, what we wanted, the type of products we wanted, and so on" (Tr. 601).

• • •

"I told them [Broughton] that I didn't think the discounts were adequate in consideration of the amount of business that we were talking about, and they agreed that they would go back and they would submit another bid, . . ." (Tr. 603).

• • •

"And I told them [Broughton] that again that I didn't think it was a true reflection of the cost savings that they were going to receive in consideration of this amount of business" (Tr. 604).

• • •

". . . again as in all these meetings, there is a great deal of fencing, who is in, who has got their proposal in, and all these sorts of things, and trying to pick up as much information as they possibly can, . . ." (Tr. 627).

• • •

". . . I had so many meetings it made my head spin. These people wanted to come in every day and they would have been in every day had you let them" (Tr. 630).

• • •

"Well, in all these meetings, Mr. Mathias, there was always a tremendous lot of fencing going on. The

people that—and this is not only Greenbrier. This is everybody else that you talked to. The people who you were talking to were trying to learn more about the limited service that we were asking relevant to this private label bid. They were trying to learn more about the amount of volume that we were talking about. They were trying to learn more about the lack of promotional activity that they would be indulging in. They were trying to learn who was their competition in the bidding and who was—what price area the price competition was in" (Tr. 668).

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"In my estimation they [the Beatrice representatives] were putting in time and they were just looking for as much information as they could obtain" (Tr. 669).

When Mr. Casserly was asked what role he played in these "fencing" matches he said:

"I was attempting to get the lowest price for my company that I possibly could without doing anything injurious to the companies or anything illegal. But I was trying to act as a good buyer could act" (Tr. 670).

The picture is clear. Mr. Casserly, by his own testimony, set out to get the lowest possible prices and he did not stop until he thought he had done so. At the outset he exaggerated the discount of the first offer he received and told all the companies that he expected lower prices because of the potential volume. Later on he took advantage of price instability in the Charleston area, and an impending reduction of costs upon introduction of regulated raw milk prices in that area, to urge even lower prices (Tr.

668-9). He gave out *no* accurate price information for the possible guidance of the bidders but urged them repeatedly to lower prices in view of cost savings. He specifically gave out *false* price information to the Beatrice representatives when he rejected the 71 cent price suggested by them in February on the ground that he had already received a better price under a 20 percent discount offer from Broughton.

According to the Beatrice representatives Mr. Casserly rejected out of hand a 68 cent price offered by them in March. He then made the neeessary calculations to connect a 66 cent price to a formula and informed the Beatrice representatives that they were "competitive" (Tr. 413, 498, 740). He did all of this despite admitting that the various proposals were complicated and that he had not evaluated them but turned them over to his accountant after all the bids were in (Tr. 721).[1]

III

The issues which must be determined on the basis of these facts are whether the Beatrice prices to Kroger for private label dairy products were discriminatory, whether any competitive injury resulted from such price discrimination as did occur, and whether Beatrice acted in good faith in attempting to meet competition or in fact went beyond the permissible bounds of the meeting competition defense and "beat" competition. We will discuss each of these points seriatim.

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[1] Mr. Casserly testified that the Beatrice proposal "was quite complicated and actually in the short time, the short time being a matter of hours, that these people were in the office, we were in no position to evaluate the proposal" (Tr. 632).

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1. *The Extent of the Discriminations to Kroger*

No one denies that the Beatrice-Kroger arrangement contemplated and resulted in different prices charged by Beatrice to Kroger and to Kroger's competitors on some products in some market areas and at some times.

Complaint counsel has tabulated differentials for specific customers of Beatrice who competed with Kroger over the period June 1962 to October 1963. These tabulations show that, in accordance with the formula in the Beatrice-Kroger agreement, the following prices were charged by Beatrice on gallons of milk in *all* areas of the Charleston Division for the months indicated:

June	1962	.5999
July	"	.6078
Aug.	"	.6133
Sept.	"	.6930
Oct.	"	.6956
Nov.	"	.6974
Dec.	"	.6938
Jan.	1963	.6680
Feb.	"	.6560
Mar.	"	.6526
April	"	.6629
May	"	.6096
June	"	.6104
July	"	.6130
Aug.	"	.6216
Sept.	"	.6320
Oct.	"	.7072

(See Appendix IV to complaint counsel's appeal brief)

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The tabulations then show, by way of specific examples, that during at least a part of the period Beatrice charged Acme Market in Beckley, West Virginia 88.2 cents per gallon (June 1962-mid February 1963). The same is true of Carolina Supermarket in Beckley. In Charleston Beatrice charged Annie's Market 71.1 cents per gallon from June to July 1962, and charged 80.1 cents per gallon until the middle of February 1963. The pattern is the same for Evans Supermarket in St. Albans near Charleston. In Clarksburg, in central West Virginia, Beatrice charged Thorofare Market and Allman Brothers 78.85 cents per gallon from June 1962 until October 1963. Beatrice charged Garden Fresh Markets in Clarksburg about 76 cents per gallon during the same period. In the Lewisburg area Beatrice charged City Market, a very small customer in Rainelle, West Virginia, the full list price of 98 cents per gallon up to September 1963. (See Appendix VI to complaint counsel's proposed findings.)

In the Logan area Beatrice was charging a local supermarket chain, West Virginia Supermarkets, which did not purchase gallons, prices on other milk products as high as 27 percent above those charged to Kroger. Price differentials on cottage cheese ranged as high as 41 percent to many of Beatrice' customers at various times (*id.*).

Complaint counsel has also tabulated purchases by specific competitors of Kroger in the various areas and computed the prices which those competitors would have paid had they been afforded the Kroger prices. This tabulation shows that had Acme Market in Beckley purchased at the Kroger prices it would have saved $6,900.47 on purchases of $39,403.05. Carolina Supermarket in the same area

would have saved $6,489.15 on total purchases of $38,014.49. In Clarksburg, Garden Fresh Markets, a West Virginia chain, would have saved $18,000 on total purchases of slightly over $175,000. The tiny City Market in East Rainelle, West Virginia, would have saved over $1,000 on purchases of approximately $3,700 or over 28%. (See Appendix VI to complaint counsel's appeal brief.)

These are but examples of the existence and extent of the differences between prices paid by Kroger for its private label products under the Beatrice-Kroger arrangement and prices paid by competitors of Kroger.

Respondents contend, however, and the hearing examiner agreed, that these figures do not indicate the true "extent of the price discriminations" involved in the case because they do not reflect the true competitive advantages to Kroger. Among other matters, they emphasize that Beatrice was also supplying its *own label* products to certain Kroger stores at the usual list price less discount. Respondents also assert that the "extent of the price discriminations" cannot be determined because Kroger necessarily incurred added expenses by performing all in-store services itself, both with respect to private and Beatrice brand products.

The analysis is erroneous. These, and other such matters relied on by respondents, do not detract from complaint counsel's convincing and largely undisputed evidence as to the *existence* and *extent* of the price differentials discussed above. Respondents' contentions are more properly considered, not in diminution of the discriminations, but in terms of whether the discriminations established of record caused the type of competitive injury condemned by

the Robinson-Patman Act. In short all of these matters go to the extent of the injury, not to the extent of the price discriminations.

The use of the term "discrimination" in Section 2(a) of the Robinson-Patman Act is inexact. In the words of the Supreme Court in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), "a price discrimination within the meaning of [Section 2(a)] is merely a price difference." Thus the existence and extent of the price "discriminations" (in the sense of price differences) are indisputably established by complaint counsel's tabulations, based on the differences between prices actually charged to Kroger for private label products and prices actually charged to Kroger's competitors for goods of like grade and quality.[1]

2. *Injury to Competition—Primary Line*

We find no injury to competition on the primary level. In recently affirming the Commission's decision in *National Dairy Products Corp.*, FTC Docket No. 8548 (June 28, 1967), the Seventh Circuit Court of Appeals emphasized that a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605, 612-13 (7th Cir. 1969). In the present case there is neither a showing of predatory intent nor a sufficient market analysis to support a finding of competitive injury.

[1] We discuss below at pp. [O-59-O-66], in the context of injury, the significance of each item urged by respondents in diminution of the differentials established by complaint counsel.

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We do not agree with complaint counsel that the hearing examiner erred in failing properly to apply the Supreme Court's opinion in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967). Utah Pie claimed that it had been injured by the discriminatory tactics of major companies in invading the frozen pie market in the Salt Lake City area. The Supreme Court held essentially that the evidence presented was sufficient to go to the jury on the issue of predatory intent. That evidence consisted of a full study of the market including growth of total sales, of the percentage of total market controlled by Utah Pie and its competitors, the dollar sales and earnings of Utah Pie and the various prices charged. The evidence also showed that sales were made below cost under a continuing program of aggressive efforts to obtain business involving repeated deep price cuts. In addition, the case contained specific evidence of predatory activities including the fact that one of the major companies had sent an "industrial spy" into Utah Pie's plant. Nothing of this sort appears in the present case. The Supreme Court's holding in *Utah Pie* is not applicable.

No attempt was made by complaint counsel here to establish through an appropriate market analysis that, even in the absence of proof of predatory intent, the price cuts by Beatrice were so deep and so aggressive as to raise a reasonable probability of injury to primary line competition. Instead complaint counsel relied upon evidence of what happened after the initiation of the Kroger-Beatrice private label arrangement to the various dairies which had been in the running for the Kroger business. That evidence shows that each of these companies suffered some loss of business with the Kroger stores. Mere loss of business,

however, is not a sufficient showing of injury to competition. As was appropriately stated in *Anheuser-Busch, Inc.* v. *FTC,* 289 F.2d 835 (7th Cir. 1961), the Robinson-Patman Act

> "is not concerned with mere shifts of business between competitors. It is concerned with the substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses" (289 F.2d at 840).

Counsel also points to facts showing a general deterioration over the period following the initiation of the private label arrangement in June 1962 in the dairy business within the Charleston Division. It appears, for example, that Fairmont closed its Charleston dairy plant in 1964 and discontinued a distribution point in Huntington, West Virginia. Borden closed a distribution point in Logan, West Virginia. Such facts may be a reflection of changing conditions in the dairy industry in the market area. They do not by themselves prove any causal relationship between the price concessions made to Kroger and the subsequent fortunes of either Beatrice or its competitors.

The Beatrice-Kroger arrangement was merely a part of a pattern of changing conditions. Subsequent to the initiation of Kroger's private label sales other chains responded by seeking lower prices. Beatrice itself began to sell A & P, first in Clarksburg and then in western West Virginia at special prices in response to competitive pressures. In February 1963 there was a major price reduction in the Charleston and Beckley areas upon the institution of a limited form of "tail-gate" service available to all customers. Responding to competitive moves by other dairies, Beatrice

reduced its list prices in those areas from a level of approximately 75 cents per gallon to 68 cents per gallon in exchange for the performance of certain in-store services by its customers. Within a matter of days, however, Beatrice (again responding to moves of its competitors) was forced to reinstitute full in-store services, but at the reduced price level.

Eventually several chains in addition to Kroger instituted private label programs of their own, in each case with the supplier being a company other than Beatrice. Finally Kroger itself, in 1966, terminated the arrangement with Beatrice and began supplying its own needs for private label products from a dairy plant which it had built in the meantime in Ohio. Thereafter Beatrice had none of the principal chain stores in West Virginia as its customers. Ironically, then, Beatrice far from reaping the supposed ill-gotten rewards of a predatory pricer may have suffered more than some of its competitors in the changing conditions of the West Virginia dairy market. In short, Beatrice' price discriminations to Kroger appear to be much more a symptom of the changes, rather than their cause.

In any event, on this record it is not possible to find, as complaint counsel urges us to, that Beatrice's price discriminations caused or were likely to cause the requisite competitive injury to the primary line which the statute commands us to find in order to establish violation of Section 2. We hold that the facts in the record demonstrate neither predatory intent nor a probability of competitive injury sufficient to establish primary line injury here.

3. *Injury to Competition—Secondary Line*

Turning to the question of secondary line injury, it is clear that the mere existence of substantial differentials between competing purchasers in a price sensitive atmosphere is sufficient to give rise to an inference of reasonable probability of injury to competition. *United Biscuit Co. of America* v. *FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965).

As discussed above, the record amply demonstrates that the differentials between the prices paid by Kroger and the prices paid by Kroger's competitors were substantial. To be sure they varied from time to time and from place to place and were not constant even as to different customers competing with Kroger in the same geographic areas. Nevertheless during many periods and in many places these differentials amounted to as much as 10 or 20, or even 30 cents or more per gallon. On cottage cheese the differentials frequently ran as high as 40 percent. Complaint counsel's tabulations, discussed above, showing the amounts which various customers of Beatrice would have paid had they been able to purchase at the Kroger prices over the entire period from June 1962 to October 1963, are particularly revealing, since they show the total dollar detriment to such customers of having to pay the higher prices.

The record establishes that there was substantial competition, both in the sale of milk and dairy products and in the sale of the full line of grocery products, between Kroger and various types of stores, independent supermarkets and groceries, and stores of the smaller type

which may carry limited lines of grocery products including milk items.[1]

The record also reflects, what we know from numerous cases involving the dairy and retail food industries, that the grocery store atmosphere is highly price sensitive. Fluid milk is an important, high volume, fast turnover product. It is one of the most important commodities carried in retail grocery stores. It has to be purchased frequently by the consumer because of its perishable nature. The record contains ample evidence that milk is frequently used as a leader and advertised at special prices. Kroger itself on occasion used milk to promote weekend sales by advertising it at low prices.

Furthermore, profit margins are notoriously low in the retail grocery business. The record shows that retailers take advantage of all available discounts and rebates in order to minimize cost and that differences in cost of a few pennies paid by the retailer for a major grocery item can have a substantial effect on gross and net profits.

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[1] Testimony, relied upon by the hearing examiner, given by certain proprietors and employees of grocery stores located in the same areas as Kroger stores, to the effect that they did not consider themselves either to be in competition with Kroger or to have been injured by Kroger's receipt of lower prices, is neither controlling nor particularly relevant. The Robinson-Patman Act protects *competition* not *competitors*. Actual injury need not be shown; nor is it even significant that competitors actually prospered. *Tri-Valley Packing Assn.* v. *FTC*, 329 F.2d 694 (9th Cir. 1964); *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *Whitaker Cable Corp.* v. *FTC*, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *E. Edelmann & Co.* v. *FTC*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). Specifically, the courts have recognized that the incipient harm to competition that may result from price discrimination "is not to be determined solely by the opinions of the store owners." *United Biscuit Co. of America* v. *FTC*, 350 F.2d 615, 622 (7th Cir. 1965).

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In view of the foregoing, a finding of secondary line injury based on the size of the differentials established by complaint counsel here is compelled by the facts and amply supported by prior authorities. In *Foremost Dairies, Inc.* v. *FTC, supra,* a Commission finding of such injury was upheld on the basis of a 5 percent rebate differential in the sale of fluid milk to a small chain of eight stores in Albuquerque, New Mexico. The rebates amounted to less than $8000 over a 17 month period. The court recognized that it was dealing with an industry in which competition in the secondary line was keen and profit margins were low. It stated:

> "... where the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition" (348 F.2d at 680).

United Biscuit Company, supra, is particularly apt. That case involved discriminations of a maximum of 6 percent in sales of cookies and crackers to grocery stores. The monthly dollar volume which was required to entitle the

purchaser to the full 6 percent maximum was comparatively small, being less than $150. The discount was graduated below this figure down to zero for very small purchases. Despite this, the court sustained the Commission's finding that there was sufficient evidence of a likelihood of substantial competitive injury. It did so despite the very small size of the dollar discounts earned by those customers granted even the maximum amount. The court noted evidence (strikingly similar to that in the present case) to the effect that the retail food business was highly competitive; that net profits were low; that cash discounts and other allowances were important, and that price was a very important, if not the most important factor, in enabling retail food stores to compete.

If maximum discounts of 5 or 6 percent on the small dollar volume involved in *United Biscuit* and *Foremost* were substantial, the price differentials which have been established here are even more so.

This case, however, differs from *Foremost* and *United Biscuit* in raising additional factual questions as to the economic advantages which the price differentials afforded to Kroger. In those cases the differentials were the obvious true measure of the favored buyer's advantage. In this case, respondents at least claim that they are not.

As distilled from their brief, respondents claim that Kroger did not really achieve any competitive advantage by its private label program because,

> (a) Kroger's purchases of private label products should be aggregated with its purchases at full list price of Beatrice brand products which were sold to eleven Kroger stores subsequent to the initiation of the private label program;

(b) Any significant price discriminations were so short-lived and so localized that Kroger gained no competitive advantages from them;

(c) Kroger necessarily incurred additional costs, which reduced its competitive advantage, by providing its own in-store services with respect to both private label and Beatrice brand label products under the "stripped service" arrangement;

(d) The anticompetitive effect of Kroger's purchases of private label products must be considered (in accordance with the *Borden* private brand case, *FTC* v. *The Borden Co.*, 383 U.S. 637 (1966)), in terms of the "value" of premium brands over private brands.

We deal with each of these contentions in order.

a) *Beatrice Brand Sales*

After initiation of the private label program in June 1962 Beatrice continued to sell to certain Kroger stores its own label products for which it charged the list price less the normal competitive discounts.[1] This came about because Kroger, in addition to wanting to institute a private label program emphasizing its own label products, also wished to eliminate the confusion in its dairy cases resulting from the fact that many of its stores carried a multiplicity of brand name products. Mr. Casserly made this known to each of the potential suppliers and many

[1] To some degree Kroger actually received less favorable treatment on these sales than other customers of Beatrice since, despite receiving no more than normal trade discounts, Kroger performed all in-store services with respect to Beatrice's brand products.

of them, including Beatrice, included in their written proposals offers with respect to their own brand products. The Beatrice proposal stated merely "Prices on our label will remain competitive."

In the spring of 1962, and in anticipation of the beginning of its private label program, Kroger conducted a survey in each of its stores to determine which brand name of dairy products was most popular with the customers at that store. That brand was then selected as the second label to be carried in each such store along with the new Kroger label. As a result of this survey Beatrice became the only brand name supplier to eleven stores in certain of the West Virginia areas. Other Kroger stores, some of which previously had carried Beatrice brands along with those of other dairies, thereafter were supplied by Beatrice only with private label dairy products.

The hearing examiner agreed with respondents' contentions that the private brand sales should be aggregated with the Beatrice brand sales to determine the extent of the discrimination. He also found that the agreement between Beatrice and Kroger covered Beatrice brand products and that such products were "of like grade and quality" with the Kroger label products. He then concluded that "realism, fairness, and simple justice require the discriminations in this proceeding to be determined by comparing the average unit price which Kroger paid to Beatrice with the average unit price Beatrice charged Kroger's competitors for an equal amount of milk of like grade and quality" [ID-145*].

[* References to the reproduction of the Initial Decision in the Appendix are designated ID— and placed in brackets]

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We disagree. In the first place, the Robinson-Patman Act requires consideration of secondary line injury on a location by location basis. Each local competitive area, indeed each Kroger store location, becomes the competitive environment within which the potential effect on competition with Kroger must be examined.[1]

In both the important Charleston market and in many other towns where Kroger stores were located, such as Logan, West Virginia, no sales of Beatrice brand products were made to Kroger. In those places the full competitive impact of the differentials which have been discussed above would, in any event, be undiminished by sales of Beatrice brand products.

Even in the areas where Beatrice sold both its own label and private label products to Kroger, however, the discounts resulting from aggregating such sales were frequently substantial. The hearing examiner adopted as a finding an exhibit prepared by complaint counsel's accountant, on the basis of detail furnished by Beatrice, purportedly showing the percentage of discriminations granted to 27 Kroger stores in three West Virginia locations based on actual sales of both private and Beatrice brand milk. The discount figures shown vary from 9.7 percent to 30.8 percent and average 16 percent. According to the previously discussed authorities even these figures would amply support an inference of secondary line injury (CX 390; [ID-146]).

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[1] The evidence here is far stronger, on this score, than in the *Foremost* case. In that case the only competitive environment examined was the city of Albuquerque, New Mexico, in which were located some eight stores in a small chain which received favored prices. Only one of these stores was located in proximity with an unfavored Foremost customer.

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Moreover, respondent's basic assumption that sales of private and Beatrice brand products should be lumped together because they are "goods of like grade and quality" under the *Borden* doctrine is erroneous. In *Borden* (*FTC* v. *The Borden Company*, 383 U.S. 637 (1966).) the Supreme Court agreed with the Commission that the quoted phrase covers identical goods packaged under different labels so that charges of price discrimination are not avoided simply because the cheaper product is packaged differently. This does not mean, however, that for all purposes brand and non-brand sales have to be treated as one to determine either the existence or effect of discriminatory charges for private label products. We are familiar with the use in many industries of "fighting brands", being identical products sold at lower prices in local markets for the purpose of protecting national brand products from potential inroads of local competition. The *Borden* decision specifically emphasized the potential competitive advantage that a seller who is able to offer both name brand and non-brand products has over his competitors who can offer only the name brand (383 U.S. at 644). We think the proper inquiry here is whether Kroger, by obtaining cheap milk under its own label was given a competitive advantage which it used to the potential injury of its competitors. On this point the record leaves no doubt that Kroger's entire purpose in contracting for private label dairy products was to obtain an overall advantage over its competitors in the Charleston Division. Kroger used the private brand milk for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors.

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Kroger merchandised its private label milk in a significantly different manner than it merchandised the vendor labeled milk which remained in its stores after the initiation of the private label program. Kroger intended to, and did, put its emphasis on the private label milk. It gave it preferred shelf space; it carried gallons, the high volume item, only in the private label and it advertised and promoted only the private label milk, including promotion of weekend sales at reduced prices.

The *Borden* case, therefore, does not support respondents' contentions that sales of brand and non-brand items have to be aggregated to determine the existence of an unlawful discrimination.[1]

b) *Discriminations Were Local and Short-Lived*

Respondents attempt to diminish the significance of the price discriminations by pointing out that they were of a local nature and comparatively short-lived. They suggest that it is necessary to view the discriminations over a period of at least a year in order to determine their effect. Again we disagree, on the ground that secondary line injury must be determined on a location by location basis.

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[1] Nor does the Commission's decision in *Admiral Corp.*, Docket No. 7094 (April 7, 1965), support respondents' position. In *Admiral* we held that the record failed to disclose the extent of discriminations because it did not show the relative importance of discriminations on different products in the line to various buyers in such a manner as to permit determination that one buyer was favored over another. Here, however, complaint counsel has established the relative overall importance of the discriminations by tabulating the amounts which unfavored customers would have paid had they been afforded the Kroger prices with respect to their actual purchases.

As to the short duration, moreover, we point out that the widest differentials existed during the period June 1962 to February 1963. This in itself is a significant length of time and removes the case from the rule of *American Oil Co.* v. *FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), in which the court reversed the Commission on the ground that concessions granted for a 17-day period in the heat of a gasoline price war were *de minimis*.

As previously noted prices to purchasers other than Kroger were *substantially* reduced in the Charleston and Beckley areas in February 1963 as the result of the introduction by the dairies of "tailgate" service which promptly became full service at lower prices. The result was that subsequently the differentials between Kroger's private brand products and Beatrice brand products were significantly reduced. They were not, however, eliminated. In any event, these events do not detract from the existence of substantial differentials throughout the prior period from June 1962 to February 1963 from which secondary line injury is properly inferred.

c) *Kroger's Additional Costs*

Respondents insist that additional costs to Kroger resulting from the performance of all in-store services with respect to both private and name brand products should be taken into account in determining both the size and effect of the price discriminations. In this contention, respondents misread Section 2(a) of the Robinson-Patman Act. It is no defense in a price discrimination case that the favored purchaser may have incurred additional costs; it is only a defense if the seller can justify his favorable price by showing *his* cost savings.

Moreover, the record contains no evidence as to the amount of the additional costs incurred by Kroger. Certainly they cannot be equated with the supposed cost savings to Beatrice. Indeed one can assume that the incremental cost to a large chain store of moving milk from its delivery platform to the dairy cases and maintaining those cases would be comparatively insignificant. Kroger's use of centralized billing and long-range order procedures, on the other hand, would probably result in cost savings *to it* rather than in additional expenses.

In any event, if respondents wished to rely on additional costs to Kroger as reducing the likelihood of competitive injury on the secondary line they should have presented evidence of such savings geared to specific store locations.

Complaint counsel, having established a *prima facie* case, cannot be required to destroy his own case by producing such evidence. It is clearly the proper burden of complaint counsel to establish both the existence of price discriminations and the requisite likelihood of competitive injury. In that connection (if the case is of such a nature) complaint counsel must establish that injury to secondary line competition can appropriately be inferred from the substantiality of the price discriminations. At that point the burden must shift. If the discriminating seller or the favored buyer can present evidence that the inference should not be drawn by showing that the favored buyer received no competitive advantage, he should do so.

d) *The "Value" of Name Brand Products*

Beatrice relies upon the Supreme Court's decision in *FTC* v. *Borden Co.*, 383 U.S. 637 (1966) and on the Fifth

Circuit's decision on remand in that case, *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), for the proposition that name brand dairy products have a "value" in excess of private label products, even though the latter be "of like grade and quality". Assuming that this proposition is correct, it may well be that some differential between name brand and private brand products is to be tolerated under the Robinson-Patman Act, and that, in a proper case, a differential between private and name brand should be taken into account in determining secondary line injury. In this case, however, the record establishes that no such justification for the differential existed.

Kroger did not market its private label products in the same way as its brand name products. It used them as a competitive tool, giving preferred space to its private label and promoting those products in order to obtain an overall competitive advantage. It did not cut prices on private label products. Indeed during much of the period in question it sold private label products at the same prices as name brand products. When it encountered difficulty in obtaining acceptance for its own label products, particularly in the early stages of the private label program, it started promoting them aggressively, and at one point gave out free samples in the Charleston market to get the program going. Beatrice shared the expense of demonstrators in the free sample program. Thus Kroger, by its own action sought to deny the value of any differential between name brand and private brand products.

For these reasons we hold that respondents cannot excuse discriminations of the size shown here in reliance on the *Borden* case.

4. *Good Faith Meeting of Competition*

The heart of the good faith defense is the subjective attitude of the seller and his reasonable belief that his price offer is no lower than is required under the circumstances. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). We have discussed above the difficulties of making an exact comparison of the final bids to Kroger arising both from the inadequacy of the record and the diverse and uncertain nature of the bids themselves. We stated our conviction that in any event the Beatrice bid was considered to be the best bid by Kroger and was accepted by it on that basis. In that sense at least, the Beatrice bid "beat" the opposition and we are squarely faced with the question as to whether in those circumstances the meeting competition defense is unavailable to a successful bidder.

The record clearly establishes the other subjective elements of good faith required under the prior cases. The Beatrice representatives did everything in their power to find the right price level in a cautious and prudent manner; they made specific investigations, tested rumors and tried by legitimate means to find out what their competitors were doing; they tried, with only slight success, to get as much information for their guidance as possible out of Mr. Casserly. If Mr. Casserly was less than fully communicative or truthful, the Beatrice representatives are not to blame and the record reveals that they had no reason to disbelieve the information which Mr. Casserly did give them. To be sure the Beatrice representatives responded to pressure from Mr. Casserly to come in with lower prices and virtually let themselves be talked into the 66 cent price per gallon that became the basis of their final offer. But if any

one failed to discharge his Robinson-Patman obligations here, it was Mr. Casserly, and not the Beatrice representatives. If businessmen are not to be prohibited entirely from bargaining in such a situation, the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried by every proper means to feel out the opposition.

What precisely did the Beatrice representatives know or reasonably believe at the time of the negotiations on March 14, 1962? They had been told by Mr. Casserly that Broughton, back in January, had offered 20 percent off list price and that Mr. Casserly expected a better price based on the high volume anticipated in the Charleston Division. In February they had determined an average list price of 85 cents per gallon and had tried a tentative suggestion of 71 cents per gallon based on a discount of approximately 16 to 17 percent off that average. They realized at the time that this price would not be good enough and Mr. Casserly so informed them in no uncertain terms, specifically pointing out that 20 percent off a list price of 85 cents would be less than 71 cents. They knew further that list prices, particularly in the Charleston area, had been subject to further erosion and that that area would shortly come under, or had come under, a Federal Milk Marketing Order which would further erode prices. They knew, whether from Mr. Casserly or some other source, that Fairmont was the most likely contender for the Kroger private label business and that Fairmont had offered a series of discounts from list price which, in addition to a special dis-

count for private label, probably took into account allowances for a Kroger television program in Charleston that Fairmont was paying for. From this they reasonably guessed that Fairmont was already in the 20 percent area. They also knew that Fairmont, at Mr. Casserly's urging, and perhaps some of the other bidders, would be coming in with prices derived from a formula based on the cost of raw milk. Since they knew that Mr. Casserly was particularly interested in this type of pricing, they could appropriately assume that these offers would be more attractive to him. Finally they knew that Fairmont had sold cottage cheese to West Virginia institutions at 16 cents per pound and had determined that the lowest Beatrice could go on that item was 17.5 cents per pound based on a special arrangement to procure skim milk for processing in Pennsylvania.

With this information the Beatrice representative came to the March 14, 1962 meeting with an offer based on a price of 68 cents per gallon. This was exactly 20 percent off the average list price of 85 cents per gallon which they had previously computed and which they then had reason to believe was going down. They came to the meeting hoping that the 68 cent price would be good enough, but were prepared to bargain further. Under these circumstances we cannot say that the Beatrice representatives knew or had any reason to know that their final offer based on 66 cents was in fact significantly below the competition. Indeed they were not told at the March 14, 1962 meeting that this was the case, or that they had won, but were told merely that they were "competitive."

Opinion of the Commission

We have previously indicated that an objective view of the evidence of record seems to establish that the Beatrice bid was lower than any other offer to Kroger on an overall price basis. The matter is not entirely free from doubt because of the inherent incomparability of the bids and inadequacies of the record. Nevertheless, we think that this case must be decided on the premise that Beatrice did, at least technically, "beat" the competition. We hold, however, that a reasonable interpretation of Section 2(b) of the Robinson-Patman Act does not require denying the good faith defense to Beatrice on this ground under the circumstances of this case.

Precisely meeting the exact prices of competitive bids can have no realistic meaning in the context of this case. Here there was no question of meeting competitive offers to maintain or obtain a share of the market. This was a winner-take-all bidding situation. Kroger asked for bids to supply the entire requirements of its Charleston Division. As far as Beatrice was concerned, the winner of the auction would be the sole supplier of Kroger's private label; the losers would be out of the Kroger stores, or at least out of Kroger's private label business entirely. The obvious objective of the Beatrice representatives was to make an offer, which would be sufficiently more acceptable than any other offer to tip the scales in their favor. Furthermore, exact comparability of price would have been impossible to achieve given the circumstances of the bidding procedure used here and prices which were subject to variation over time beyond the control of the parties and which were not predictable.

To require that Beatrice adhere to a precise "meet but not beat" criterion under these circumstances, where the

Beatrice representatives otherwise exhibited every element of good faith, is not reasonable. To hold otherwise would be effectively to outlaw such bidding situations by insisting upon an artificial and rigid test. We think that protection of competition under the Robinson-Patman Act can be accomplished in such cases by focusing on other questions (such as the responsibility of the buyer not to exceed the permissible bounds of bargaining) and that the language of the Act is not so inflexible as to require a finding against Beatrice on this ground.[1]

IV

Having concluded Beatrice acted in good faith, it is unnecessary to consider Beatrice' cost justification defense in connection with the charges against Beatrice. The question of cost justification, and to some extent the validity

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[1] Both the courts and the Commission have recognized that there is a need for flexibility in applying Section 2(b) of the Act in various situations. As the Commission stated in *Continental Baking Co.*, 63 F.T.C. 2071 at 2163 (1963):

> "This is a flexible and pragmatic, not technical or doctrinaire concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. . . .
>
> "Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application."

The Fifth Circuit Court of Appeals emphasized such realistic criteria when it reversed the Commission's decision in *Calloway Mills* and held that a quantity discount system employed in the sale of carpeting which did not precisely meet competitive systems was nevertheless permissible because of qualitative differences in the way carpeting was sold by industry members. *Calloway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966).

of the Beatrice cost study, must, however, be considered in connection with the charges against Kroger.

Any cost justification defense in this case suffers from a fundamental conceptual defect which no amount of statistical analysis can change. Given the nature of the market, the existing price structure in it and the structure of the pricing arrangements between Beatrice and Kroger, it is quite likely that circumstances would arise in which a cost justification defense would fail. This is exactly what happened when it turned out that raw milk costs were relatively low in the early period of the private label arrangement.

Kroger and Beatrice chose to use a pricing system in which prices were ultimately determined by the cost of raw milk plus a fixed differential to cover distribution expense and profit. Competitors of Kroger, on the other hand, continued to purchase under the normal list-price-less-discount structure which bore no necessary relationship to the cost-plus formula but which was governed by local competitive conditions. Also, instead of being related to increments representing actual costs of distribution by Beatrice to the various Kroger stores, prices under the private label arrangement between them were ultimately based on *average* distribution cost which bore no necessary relationship to the actual costs to Beatrice of distribution in the specific submarkets. This meant that the Beatrice prices to Kroger were uniform throughout the Charleston Division, despite the fact that Beatrice' actual cost of supplying the various Kroger stores could not have been uniform.

Furthermore, because the Beatrice plant was located in Beckley in the high priced milk area, Beatrice necessarily

incurred greater costs in distributing its milk products to Kroger's competitors in the lower priced Charleston area. An example will illustrate. In October 1962 Beatrice was selling milk to the A & P in Beckley, where the Beatrice plant was located, at $.931 per gallon; it was selling milk processed at the same plant to A & P for $.801 per gallon in Charleston, 50 miles away. At the same time it was selling milk to Kroger in both locations at $.6956. The price differences which Beatrice was called upon to justify, therefore, on the basis of supposed cost savings in selling to Kroger were over 23 cents in its home town, Beckley, and less than 11 cents in Charleston, 50 miles away. Unless Beatrice's cost study showed that the Charleston price difference was *overjustified* by *more than twice* that difference, it could not hope to justify the Beckley difference.

The problem faced by Beatrice in attempting cost justification was compounded by these anomalies in the pricing structure. Normally a cost justification is attempted only to justify an *additional* discount from a standard price structure. This was successfully undertaken in part by the respondent in the *National Dairy* case on which Beatrice purports to rely (*National Dairy Products Corp.*, Dkt. 7018 (July 28, 1966)). In such a case the different prices charged various customers bear a necessary relationship to each other governed by the amount of the additional discount. Conceptually that discount may be equated with a specific measurable cost saving, such as lower distribution costs on delivery to large customers, as in the *National Dairy* case. Here, however, it is conceptually difficult to see how the differentials with respect to prices that bear no necessary or constant relationship to each other can ever

be made the subject of a similar equation, no matter how accurately the cost savings as to particular sales may be determined. If raw milk costs were relatively low and list prices less discount relatively high (as they were at various times) there would be large price differentials between prices paid by competing customers which would be unrelated to costs. Furthermore, because of the inverse relationship between prices charged by Beatrice on its discount sales and its costs of distribution, those differentials would not reflect relative cost savings when examined on a customer by customer basis.

The cost study is based on computation of an "earned discount" for each Kroger store served by Beatrice' Beckley plan. The earned discount was determined by subtracting from a computed "regular" price, which Kroger supposedly would have paid in the absence of any discount, Beatrice's "dock costs" and the incremental costs of distribution to Kroger stores based primarily on "stop time", which was determined by studies of the length of time that the Beatrice route men required to service the Kroger stores. Beatrice then compared the "earned discount" with the percent off list price of prices actually paid by the Kroger stores. This supposedly established that the discounts earned by cost savings were greater than the discounts actually received by Kroger. This, of course, does not establish a cost justification defense, since the question is not whether savings in distribution costs to Kroger were greater than the discounts actually received by Kroger. The differentials between the prices paid by Kroger and prices paid by its competitors must be equated with that cost saving. To do this Beatrice also computed "earned

discounts" for other customers. In doing so Beatrice established three classes of customers and averaged the discounts earned within each class. The purpose of this was to show that when these average discounts were compared to the discounts earned by Kroger it appeared that the Kroger earned discounts were greater.

The hearing examiner found that the cost study should not be accepted as a cost defense because of various inaccuracies and unsupported estimates in the figures and assumptions used in the study. We basically agree with the hearing examiner and set out here a brief summary of some of the difficulties which we perceive in the cost study as presented by Beatrice.

Of overall significance is the lack of proof that the data underlying the cost study exhibits is either reliable or representative of the period of the discrimination. For example, distribution expenses for delivery to customers served by the Beckley plant for the base period March through May 1962 (before the private label program began) were used to determine Beatrice' costs of serving all customers served by both the Beckley and Clarksburg plants for the entire discrimination period June 1962-October 1963 (Tr. 1852; RBX 106A). Beatrice furnished no indication as to how or why Beckley costs should be representative of both plants, and why the three months March-May 1962 should yield representative distribution expenses for the seventeen subsequent months.

Further, the reliability of Beatrice's estimates for the number of minutes stopped per day at each store is doubtful. Such "stop time" is the most crucial variable in determining the validity of the attempted cost justification,

since it is savings in time stopped at Kroger stores resulting from the limited service arrangements which Beatrice claims justified the extra discounts to Kroger. In some of the cost exhibits (RBX 157, 158A-B), the number of minutes stopped at each store during October 1962 were estimated two years after the stops were made, i.e., in September or October of 1964 (Tr. 2113, 2118-19). In several other exhibits using stop time estimated for January 1965 (RBX 108A & B, 109A & B, 110A & B, 111A, 155A-C, 156), the estimates were made only a few months after the period in question (RBX 4, 30-103), but these estimates were made for a month long after the discrimination period, with nothing to show that conditions affecting stop time had remained the same. Indeed, there were strong indications that such conditions had changed, since sales per store for a large sample of Kroger stores had increased substantially (CX 384). Moreover, the two resulting estimates of stop time for January 1965 and October 1962 at a given store varied so widely (CX 384) that one must either believe that conditions affecting stop time were completely different during the two periods or that one or both of the estimating methods yielded unreliable results. In this regard, the Beatrice accountant who prepared the cost study did not consider the estimates for October 1962 very reliable (Tr. 2111-12), since they depended on the dim memories of route men as to what they had done two years previously (Tr. 2117-19), and who were likely to overstate time in the interest of convincing their bosses they were putting in a full day's work (Tr. 1811-12). As to the January 1965 estimates, complaint counsel's accountant cited obvious exaggerations of service times (Tr. 2116), for example, 30 and

35 minutes for average daily sales of only $6.36 and $7.24 (CX 397F).

In the case of yet another stop-time estimate, a one-day time and motion study, Beatrice' accountant admitted that conditions had changed substantially on the routes between the period of the claimed discriminations and the time when the one-day study was done in October 1966 (Tr. 1976). The accountant also stated, and was corroborated by a Beatrice driver, that if, as was done in this study, one timed a particular driver, the driver would tend to be more efficient than usual and the time he reported for a given delivery would be shorter than his customary time (Tr. 1811, 1486-87).

In comparing discounts earned by various classes of customers Beatrice also arbitrarily excluded from "Class III" customers a number of customers whose purchases of milk and other dairy products exceeded a $54 per day upper limit. This introduced an unwarranted bias in Beatrice' favor. Complaint counsel presented data to show that, using a set of consistent assumptions for all stores, Beatrice' cost of distribution to customers other than Kroger taking over $54 per day was significantly less as a percent of sales than cost of distribution to customers grouped in Class III who took smaller amounts (CX 391). Another exhibit shows, again on consistent assumptions for each store, that the percentage difference in *earned* discount between Kroger and other customers taking more than $54 per day was significantly less than between Kroger and Class III customers taking under $54 per day (CX 388). Since Beatrice was interested in maximizing the difference between Kroger's earned discount and the earned discount of the

non-favored customers so as to show that Kroger earned a substantially larger discount, failure to include in the comparison large non-favored customers constitutes a grave deficiency in the cost analysis.

Another deficiency in many of the cost study exhibits is the inflation in Kroger's favor of differences between Kroger's and non-favored customers' earned discounts resulting from the arbitrary assumption that platform costs for products delivered to Kroger constituted a lower percentage of regular price than did platform costs for products delivered to Kroger's competitors. For the non-favored competitors Beatrice used platform costs equal to 74 or 75 percent of regular price; platform costs used for Kroger, however, were 70 or 71 percent except in one exhibit (RBX 108A & B, 109A & B, 111, 113A-D, 116A-D, 117). This inflated Kroger's earned discount relative to the earned discounts of competitors by 3 to 5 percent. There is no support in the record for this different treatment of platform cost percentages.

Yet another deficiency in many of the cost study exhibits is the artificial and arbitrary inflation by Beatrice of the so-called "regular" price which Kroger would have paid in the absence of discounts as compared with regular prices which would have been paid by Kroger's competitors. This resulted in overstatement of Kroger's earned discounts relative to competitors' earned discounts. In many exhibits Beatrice derived the regular price which Kroger would have paid by assuming that Kroger's actual prices constituted a 20 to 26 percent discount from the regular price (RBX 108A & B, 110 A & B, 111A, 155A-C). Kroger's actual discounts were substantially smaller. For

competing customers, however, this distortion was not introduced because Beatrice based its computation for them on list price and actual discounts (RBX 113, 115, 116, 117, 159).

In all, non-uniformity and lack of realism or reliability of assumptions about platform costs, regular prices, and most especially, methods of estimating stop time; the failure to establish that the various cost exhibits were reasonably representative of the period of the discrimination; and the failure to take account of large as well as small non-favored customers leads us to find that the Beatrice cost study is totally unreliable.

V

The complaint charged Kroger with knowingly inducing and receiving discriminatory prices for fluid milk and other dairy products in violation of Section 2(f) of the Robinson-Patman Act. The hearing examiner found that the charges should be dismissed on the ground that the charges against Beatrice were not proven and on the further ground that there was no evidence that Kroger knew or had any reason to know that the prices offered to it by Beatrice were not offered in good faith to meet an equally low price of a competitor.

Given the prior disposition of the charges against Beatrice, the issue is raised as to whether Kroger must automatically be found innocent. We hold that such a result does not follow as a matter of law and that, because of the factual situation surrounding the negotiations for private label dairy products, Kroger must be held to have

violated Section 2(f) of the Robinson-Patman Act by knowingly inducing and receiving discriminatory prices.

The facts previously set out demonstrate all of the elements necessary to establish unlawful discriminatory prices. They also establish that the discriminatory prices were arrived at as the result of hard bargaining on both sides. We have held that Beatrice did not exceed the bounds of good faith and therefore is to be excused from liability. This does not mean, however, that everyone is to be excused. The discrimination remains and the requisite showing of potential injury to competition has been made. The question is whether Kroger stepped over the bounds of proper negotiation. The facts relating to Mr. Casserly's conduct of the negotiations must provide the answer.

Kroger asserts that the facts show no more than that it engaged in hard bargaining. Were there no more at stake here than the business relationship between Beatrice and Kroger we would agree. But the Robinson-Patman Act is not designed for the protection of either side in a bargaining session; it is designed for the protection and preservation of competition with the bargainers. Thus, in a Section 2(f) case there is no necessity of establishing coercion of the seller. It is enough to satisfy the element of "inducement" that the buyer used its buying power in such a way as to raise the likelihood of injury to its competitors by seeking and obtaining advantages not accorded them. See the Court of Appeals decision in *Fred Meyer Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966).

We think the summary of the negotiations and Mr. Casserly's conduct of them set out above in this opinion amply demonstrate that Kroger bargained too hard—not because

it was able to wring an oppressive contract out of a weak seller, but because it did not have a sufficient regard for its Robinson-Patman obligations. If a buyer chooses to use its bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law. Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. And this is so even though the seller has lived up to his Robinson-Patman obligations by maintaining the good faith required for a Section 2(b) defense.

Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was "competitive" without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act.

Kroger relies on the Supreme Court's basic Section 2(f) decision in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953) first, for the proposition that it is entitled to the benefit of any defenses, including good faith, which are available to Beatrice, and second, for the proposition that

it could not reasonably have known that Beatrice's discriminations to it were *not* cost justified.

In *Automatic Canteen* the Court stated:

> "We therefore conclude that a buyer is not liable under §2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses" (346 U.S. at 74).

Kroger asserts that this means it cannot be liable if Beatrice is found to have acted in good faith. We disagree. There may be instances in which a buyer is insulated from liability by the seller's good faith but *Automatic Canteen* does not hold that the buyer is always entitled to avail himself of such a defense, nor does it compel such a result in the present situation. Undoubtedly a buyer can accept an offer made to meet competition which in fact does beat a competing offer if the buyer has done nothing to initiate the price break in the first place, but to hold that a buyer can escape liability merely by inducing and accepting a second discriminatory offer which meets an offer *previously induced by the buyer* would make a mockery of Section 2(f). We find no authority to the contrary and note that in a similar situation involving inducing of non-proportionalized allowances we so held. See *Max Factor & Company,* Docket No. 7717 (July 22, 1964).

Since we have held that the Beatrice cost defense is in fact invalid the only remaining question under *Automatic Canteen* is whether Kroger could reasonably believe that the discriminations in its favor were cost justified. The burden of establishing Kroger's liability on this point is

upon complaint counsel. We generally articulated that burden for a situation where a favored buyer purchases in quantities or under methods differing from those of unfavored buyers in *Suburban Propane Gas Corp.*, Docket No. 8672 (May 25, 1967), where we said:

> " . . . if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden."

We think that the criterion is appropriate here and that complaint counsel has discharged his burden.

Mr. Casserly, Kroger's negotiator, certainly had a thorough knowledge of the dairy industry and the methods of doing business in it. He was in fact specially designated by the company to negotiate a private label arrangement for the Charleston Division. He acquired specific knowledge of conditions in the Charleston Division by taking a trip through the various areas before the negotiations really got under way and making other trips in the areas during the course of the negotiations including a trip to inspect the Beatrice plant in Beckley. He therefore knew and saw for himself the distribution set-up employed by Beatrice. He also was very familiar with the existing price structure in the various areas and was specifically familiar with, and remarked upon, both in writing and orally, the changing price conditions in the Charleston area.

Mr. Casserly also knew that each bidding dairy was attempting to come up with lower than normal prices in order to win the Kroger patronage. He stated that he did not know the costs of any of the dairies but he told them all that he expected prices below a 20 percent discount off list because of the large number of stores to be served[1] and he specifically told Broughton that its bid was too high and that he thought cost savings would justify further reductions. He saw that each bid entered, except the Beatrice bid, contained different prices for different areas. He also must have been aware that the reason that the bids showed different prices was because of varying costs due to the proximity or remoteness from processing and distribution points, which varied among the dairies.

Mr. Casserly was also specifically aware that cost justification might be essential in order that lower prices to Kroger might be legal. Both Valley Bell and Fairmont expressed concern to Mr. Casserly about this, and Fairmont even submitted to Mr. Casserly memoranda of law from its counsel on the subject.

It is apparent, however, that Mr. Casserly did not receive any information from Beatrice or any other bidder that specific differentials between prices offered to Kroger and prices being paid by Kroger's competitors were cost

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[1] If Mr. Casserly thought that this fact alone would effectively cost justify lower prices, he was, of course, in error as a matter of law. Cost justification based on an aggregate or average saving of serving a number of stores in a chain is not acceptable where it does not take account of varying cost in serving individual stores. *National Dairy Products Corp.*, Docket No. 7018 (July 28, 1966). Discounts to multi-unit purchasers must be justified on a store-by-store basis.

justified. Indeed his testimony indicates that Mr. Casserly only had in mind one half of the cost justification equation and never focused on the need for justifying such differentials, as opposed to mere cost savings resulting from a curtailed form of service to the Kroger stores. Had he done so he should have recognized (what the Beatrice cost study only tends to obscure) that by buying milk from Beatrice at a uniform price based on a cost formula, while competitors continued to purchase on an unrelated list-price-less-discount, it was very unlikely that any cost justification would be successful. Particularly is this so since Mr. Casserly should have known that Beatrice' discount sales had to be unrelated to actual costs because Beatrice sold at higher prices where its distribution costs were lower, due to the location of Beatrice' primary processing plant in the high priced Beckley area.

Accordingly we conclude that Kroger should have known that the Beatrice price discriminations were not cost justified and that Kroger has violated Section 2(f) of the Robinson-Patman Act.

VI

The remaining matter to be dealt with concerns alleged price discriminations to A & P.

In October 1962 Beatrice began to sell its own label products to A & P in the Clarksburg area at special prices. Then, in late 1962, Mr. Stollings negotiated a separate agreement for special prices to A & P stores served by the Beckley plant in the southwestern portion of West Virginia. The latter agreement went into effect in January 1963. The parties apparently are agreed that there

were two separate transactions with A & P, although the hearing examiner discusses only the latter one.

The Clarksburg arrangement resulted in price differentials in favor of A & P of between approximately 10 and 16 percent on most items from October 1962 through October 1963. Although the Clarksburg arrangement with A & P involved a limited form of in-store service, no effort has been made by Beatrice to justify this discrimination in any respect. Instead Beatrice relies on the fact that all of the milk sold to A & P in Clarksburg during the period in question was produced within the state of West Virginia and never crossed state lines and argues, therefore, that the commerce requirement for Robinson-Patman illegality is not met. Complaint counsel's response is that the Clarksburg arrangement was negotiated across state lines with the A & P division located at Pittsburgh, Pennsylvania, and that sour cream and cottage cheese products sold to A &. P came from outside of West Virginia. Interstate negotiation, however, alone is insufficient to fulfill the commerce requirement of the Robinson-Patman Act and the inconclusive evidence with respect to sour cream and cottage cheese shows that interstate movement of those products was *de minimis* at best, and in no event would support a broad order covering all dairy products. *Foremost Dairies, Inc.* v. *FTC,* 348 F.2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965); *Dean Milk Co.* v. *FTC,* 395 F.2d 696 (7th Cir. 1968).

The Beckley arrangement with A & P was negotiated by Mr. Stollings in specific response to information that Borden was instituting a special limited service program with A & P in parts of Ohio and in the area served by Borden's

Huntington, West Virginia plant. Borden was not at that time selling in all of the areas served by Beatrice' Beckley plant, but Mr. Stollings testified that he had been unable to find out exactly how far into West Virginia the Borden offer would reach. Mr. Stollings obtained a copy of a Borden price sheet and submitted an offer to A & P based on a 10 percent differential over the Kroger prices. These prices very closely approximated those offered by Borden to A & P. The proposal was accepted by Borden and went into effect in January 1963.

The record reveals that the price advantage to A & P resulting from the Beckley arrangement was significant for only a very short period. At the outset the price advantage amounted to as much as 23 percent but in the middle of February 1963, as previously mentioned, Beatrice instituted a new program of "tailgate" service throughout the area covered by its Beckley plant which resulted in sharply reduced prices for all purchasers under the normal discount system. Under the tailgate service all customers became entitled to the lower prices in exchange for a limited form of in-store service similar to that being given to A & P. The discount structure, as so modified, meant that the prices paid by A & P's competitors in the territory were very close to those being paid by A & P. Mr. Stollings testified that within a week or so Beatrice was forced to reinstitute full in-store service but at the same low tailgate prices. This left A & P's competitors paying only slightly higher prices than A & P but having full in-store service while A & P continued to receive only the equivalent of tailgate service.

Opinion of the Commission

Since the record does not establish that the differential resulting from the special price to A & P, as compared with prices to its competitors in the Beckley area, was of sufficient significance subsequent to the middle of February 1963 to warrant a finding of secondary line injury, we dismiss the charge of unlawful discrimination based on sales to A & P. The fact that there was a substantial differential for a period of a little more than a month is *de minimis* under the circumstances of this case, particularly in view of the rapidly changing market conditions which are established of record. See *American Oil Co.* v. *FTC*, 325 F.2d 101, *supra*.

It also appears that Beatrice has sustained a good faith meeting of competition defense with respect to special prices to A & P in the Beckley area. There is no doubt that Mr. Stollings tried to meet on an overall basis the offer which he found Borden was making in Ohio and apparently threatening to make in parts of West Virginia. The fact that Mr. Stollings may have included A & P stores which were not within the contemplation of Borden as far as the record shows does not warrant denying the defense.

VII

We hold that the record establishes the existence of substantial discriminations between prices charged by Beatrice to Kroger and to Kroger's competitors in the Charleston Division from which substantial injury to secondary line competition must be inferred. We find, however, that the record sustains Beatrice's good faith meeting of competition defense and accordingly dismiss the charges against Beatrice.

Opinion of the Commission

We hold that Kroger knowingly induced and received discriminatory prices for fluid milk and other dairy products; that Kroger is not entitled to any benefit of Beatrice' good faith defense; that the discriminations were not cost justified and that Kroger did not reasonably believe them to be so justified; and that, accordingly, Kroger violated Section 2(f) of the Robinson-Patman Act.

Finally, we hold that the record establishes no unlawful price discriminations by Beatrice in favor of A & P.

Commissioners Dixon and MacIntyre each dissented in part and concurred in part and filed separate opinions stating their views.

Commissioner Elman filed a dissenting opinion setting forth his reasons why the complaint should be dismissed against both respondents Beatrice and Kroger.

Commissioner Nicholson dissented for the reason that the record does not establish a violation of Section 2(f) of the Clayton Act by respondent Kroger. As to respondent Beatrice, Commissioner Nicholson concurred in the opinion and order dismissing the complaint.

December 1, 1969

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Concurring and Dissenting Opinion

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

Docket No. 8663

In the Matter of

BEATRICE FOODS CO., a corporation, and
THE KROGER CO., INC., a corporation.

Commissioner Dixon, concurring in part and dissenting in part:

I concur in that part of the opinion which holds that Kroger violated Section 2(f). I dissent from the holding that Beatrice's lower price to Kroger was made in good faith to meet an equally low price of a competitor.

The opinion, as I read it, stands for the proposition that a large buyer can use his purchasing power to induce a supplier to discriminate in price regardless of the anti-competitive consequences of such discrimination, and that the supplier can with impunity succumb to such inducement under the protection of the Section 2(b) proviso without regard to whether the lower price he is meeting may be unlawful.

Concurring and Dissenting Opinion

The legislative history of the Robinson-Patman Act reveals quite clearly the congressional intent to prohibit large buyers from securing an advantage over their smaller competitors solely because of their quantity purchasing power. In passing the Act, Congress intended to assure "that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." [1] But according to the opinion in this case, there is no violation of law when a powerful buyer is "able to wring an oppressive contract out of a weak seller" and that "If a buyer chooses to use his bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law."

The history of the Act further discloses that Congress was fully aware that "in nearly every case mass buyers receive similar discriminations from competing sellers of the same product." [2] It is equally clear that Congress did not intend that Section 2(b) should be used to permit a large buyer to negotiate lower prices by having suppliers bid against one another for his business without regard to the legality of such discriminatory offers. In referring to the legislative debates concerning this practice, one commentator has written:

> ". . . where a seller's price reduction produced competitive repercussions on the customer level, as in the typical price discrimination in favor of the individual 'big buyer,' the legality of the competitor's price was

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[1] *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963).

[2] 80 Cong. Rec. 9418 (1936).

a focal concern. Here to permit an illegal price cut by one supplier to a particular chain store to be justified under the statute by reference to an illegal price discrimination procured by such a buyer from another supplier could have legalized the very discriminatory pricing in favor of big buyers which the Robinson-Patman Act was designed to check. As Representative Utterback put it, such a device to exonerate illegal discriminations to big buyers by one supplier because of comparable illegal prices by others could 'nullify the act entirely at the very inception of its enforcement.'"[3]

While I do not suggest that a seller invoking the Section 2(b) defense must prove the legality of competitive prices,[4] it should be incumbent upon him, as part of the good faith requirement, to show the existence of circumstances which would lead a reasonable person to believe that the price he was meeting was lawful. When claiming the protection of the Section 2(b) proviso, "The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances that are peculiarly favorable to price discrimination abuses."[5] And a necessary element of good faith is the showing that despite the seller's awareness of the probable illegality of

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[3] Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 215.

[4] *Standard Oil Company* v. *Brown*, 238 F.2d 54 (5th Cir., 1956).

[5] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945).

his own price, he reasonably believed that the price he was meeting was lawful.[6]

The record in this case reveals also that, in its dealings with Kroger, Beatrice knew that it was engaged in a bidding contest and that Kroger would buy from the *lowest* bidder. Beatrice was therefore fully aware that it was not meeting an equally low price of a competitor. It was *beating* all competitive offers. The opinion states that "the language of the Act is not so inflexible as to require a finding against Beatrice on this basis." I do not agree. While inadvertent underpricing of a rival by a seller who is attempting in good faith to meet a lower price may not necessarily invalidate the defense, neither the language of the Section 2(b) proviso nor any authority supports the majority's position that a seller can justify under that proviso the calculated and deliberate undercutting of a competitor's price.

Beatrice has totally failed to make the required showing under Section 2(b) and its defense should have been rejected.

December 1, 1969

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[6] "So the net of the law today appears to be this: If a seller's prices merely emulate an actually or inherently illegal pricing system . . . the Section 2(b) proviso can furnish no legal succor. If, on the other hand, the lower price is made in a genuine competitive situation, such as prevailed in the Standard Oil controversy, a Section 2(b) defense is not barred *so long as the seller could have reasonably believed that the price he was meeting was legal.*" (Emphasis added.) Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 226.

Concurring and Dissenting Opinion

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

Docket No. 8663

In the Matter of

BEATRICE FOODS CO., a corporation, and
THE KROGER CO., INC., a corporation.

Commissioner MacIntyre, dissenting in part and concurring in part:

I do not concur in the majority's holding that the record establishes on the part of Beatrice the elements of the meeting of competition defense spelled out by judicial precedent. The complaint as to this respondent should not have been dismissed. In my view, the majority opinion errs by failing to adhere to the rule that the burden of establishing the defense rests on the party asserting it. Here Beatrice has failed to carry its burden since the record, in my view, at least, does not demonstrate that respondent displayed the diligence of inquiry into alleged competitors' offers required by the precedents, e.g., see *Federal*

Trade Commission v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

The majority erred in dismissing the complaint against respondent Beatrice. I agree that respondent Kroger violated Section 2(f) of the Clayton Act, as amended. I join, therefore, in the findings of fact and the reasons stated in support thereof on which the order to cease and desist against respondent Kroger is based.

December 1, 1969

Dissenting Opinion

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

Docket No. 8663

In the Matter of

BEATRICE FOODS CO., a corporation, and
THE KROGER CO., INC., a corporation.

Commissioner Elman, dissenting:

The Commission holds—and I agree—that Beatrice's prices to Kroger did not violate Section 2(a). The examiner's findings in respondents' favor on all the crucial fact issues—discrimination, competitive injury, and meeting competition—are amply supported by the evidence in the record. Moreover, the Commission does not find, because the record would not justify such a finding, that (1) the price offers made to Kroger by Beatrice's competitors were unlawful under Section 2(a), and (2) either Beatrice or Kroger had any reason to believe that the price offers made by the other sellers were unlawful. We are confronted, then, with a Commission decision holding Kroger guilty under Section 2(f) of "knowingly" inducing or re-

ceiving "a discrimination in price which is prohibited by this section", on a record which fails to show any price discrimination illegal under Section 2.

The majority opinion skirts this difficulty by holding that Kroger violated Section 2(f) because of the manner in which its representative, Mr. Casserly, conducted the negotiations with Beatrice. The Commission finds that Kroger "bargained too hard" because "it did not have a sufficient regard for its Robinson-Patman obligations". "Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was 'competitive' without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act." ([Q-81.])

It puts too heavy a burden on the Robinson-Patman Act to convert it into a "truth-in-bargaining" statute. That Act is aimed at illegal and anticompetitive price discriminations, and nothing else. No one has heretofore conceived of the Robinson-Patman Act as imposing a duty of affirmative disclosure on buyers engaged in price negotiations with sellers, requiring them to convey "correct information" on the prices quoted by other competing sellers. Even when Congress passed the Truth-in-Negotiations Act dealing with defense contracts (P.L. 87-653, 76 Stat. 528, 529,

10 U.S.C. 2306(f)), it did not go so far. Perhaps it would be in the public interest—although I doubt it—that Congress should enact a new law imposing on buyers in all private business transactions an affirmative duty of making full and accurate disclosure to each seller of information bearing on other sellers' price offers. But there is no such law now, and this Commission is not authorized to write one.

In any event, the Robinson-Patman Act, as it was written by Congress, is not violated by a buyer who bargains "too hard" unless there is proof of a knowing inducement or receipt of a price discrimination prohibited by Section 2. In the absence of such proof, we are not authorized to subject a respondent to a boilerplate 2(f) order merely because we think it has bargained "too hard". An order prohibiting the knowing inducement or receipt of illegal price discriminations has nothing to do with a "violation" which consists only of bargaining "too hard".

As submitted to us on the record and arguments, this was a conventional 2(f) case, proceeding on the familiar *Automatic Canteen* theory, i.e., that Beatrice's prices to Kroger were illegal, and that Kroger knowingly induced and received such illegal prices. That theory of violation having been rejected by the Commission because it is unsupported by the record, dismissal of the complaint is required. The novel and extraordinary legal theory on which the Commission now imposes 2(f) liability on Kroger was neither alleged in the complaint, issued July 30, 1965, nor urged by Commission counsel at any stage of these proceedings. This new theory apparently entered the case some time after the oral argument on appeal before the Commission on March 26, 1968. *Cf., Rodale Press, Inc.* v. *Federal Trade Commission,* 407 F.2d 1252 (D.C. Cir. 1968).

December 1, 1969

APPENDIX SC

Initial Decision

ID :99

FILED: September 18, 1967

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8663

In the Matter of

BEATRICE FOODS CO. *et al.*

Initial Decision

ABNER E. LIPSCOMB
Hearing Examiner

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8663

In the Matter of

BEATRICE FOODS CO., a corporation, and
THE KROGER CO., INC., a corporation.

INITIAL DECISION

Abner E. Lipscomb, Hearing Examiner

Fiodie P. Favarella; John J. Mathias; and Rafe H. Cloe, Counsel Supporting the Complaint

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Norman Diamond; Murray H. Bring; and Max H. Crohn, Jr. of Arnold & Porter, 1229—19th St., N.W., Washington, D.C., Counsel for Respondent The Kroger Co., Inc.

Initial Decision

I. *The Complaint and the Statute*

The complaint in this proceeding, consisting of two counts, was issued on July 30, 1965.

Count I of the complaint, as modified by the More Definite Statement made by complaint counsel, alleges that the respondent Beatrice Foods Co., beginning in June 1962, violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in prices in the sale of fluid milk and other dairy products and by selling those products to The Kroger Co., Inc., the Great Atlantic & Pacific Tea Co., Inc., and Garden Fresh Markets, Inc., at lower prices than Beatrice Foods Co. sells those products of like grade and quality to other retail customers in competition with the companies named above. The provisions of the Clayton Act upon which Count I of the complaint is based provide as follows:

> "Sec. 2.(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who

either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Count II of the complaint alleges that respondent The Kroger Co., Inc., in its negotiations with respondent Beatrice Foods Co., " . . . for the supply of fluid milk and other dairy products under private label brands to the stores of Kroger's Charleston Division . . . ", before and after June 4, 1962, knowingly induced or received prices " . . . which were and are discriminatory under the provisions . . . "

of subsection (f) of Section 2 of the Clayton Act, as amended. The portion of the Clayton Act upon which Count II of the complaint is based provides as follows:

> "(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

II. *The Respondents' Answers*

On September 15, 1965, respondent Beatrice Foods Co. filed its answer in which it made certain factual admissions, but denied the principal charges alleged in the complaint, and pled a number of affirmative defenses, as follows:

1. The prices charged were not unlawfully discriminatory;

2. Competitors of Beatrice Foods Co. were not injured within the meaning of Section 2(a) of the Clayton Act;

3. Competitors of the alleged favored customers were not injured within the meaning of Section 2(a) of the Clayton Act;

4. Certain of the alleged discriminatory sales were not sales in commerce as defined in Section 2(a) of the Clayton Act;

5. All price differentials, if any, were instituted in good faith to meet competitors' prices; and

6. All price differentials, if any, represented permissible differentials because they made due allowances for dif-

ferences in the cost of manufacture, sale, or delivery that resulted from differing methods of distribution or differing quantities sold to the alleged favored customers.

Respondent The Kroger Co., Inc. filed its answer on September 27, 1965, in which it made certain factual admissions, but specifically denied that the alleged differentials in price as to sales to The Kroger Co., Inc., violated Section 2(a) of the Clayton Act; and further, it denied that it knowingly induced or received any unlawful price discriminations from Beatrice Foods Co. or that it knew or should have known that the prices of Beatrice Foods Co. constituted discriminations violative of Section 2(a).

III. *Hearings, Proposed Findings, and Abbreviations*

Hearings for the reception of evidence in support of the case-in-chief, in defense, in rebuttal, and in surrebuttal were concluded on March 21, 1967. Consideration has been given to the entire record herein, including proposed findings as to the facts, proposed conclusions, and written arguments in support thereof. Each of those proposals that has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected as not supported by the evidence of record or as not deemed necessary to a fair determination of the issues herein.

Citations in this initial decision have been abbreviated as follows:

CX—Commission Exhibit
Tr.—Page in Transcript
RBX—Respondent Beatrice's Exhibit
RKX—Respondent Kroger's Exhibit

ARA—Respondent Beatrice's Answer to Request to Admit, filed September 23, 1966

Hereafter, respondent Beatrice Foods Co. will be referred to as "Beatrice"; respondent The Kroger Co., Inc., as "Kroger"; and the Great Atlantic & Pacific Tea Co., Inc., as "A & P".

IV. *The Issues*

The principal issues arising from the pleadings, the evidence, and the relevant provisions of the Clayton Act are as follows:

A. *Commodity*

What are the products involved in this proceeding?

B. *Time Involved*

During what period of time did the alleged discriminations occur?

C. *Sales in Commerce*

Were the sales by Beatrice to its favored customers made in commerce within the meaning of the Clayton Act?

D. *Discrimination*

Did the discriminations in price, if any, which Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets, Inc., or to any of them, have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce, or injuring, destroying, or preventing competition with any person who either granted or know-

ingly received the benefit of such discriminations, or with the customers of any of them, or did such discriminations create a reasonable probability of such an effect?

E. *Meeting Competition*

Were the prices for milk and cottage cheese that had been agreed to by Beatrice and Kroger, by Beatrice and A & P, and by Beatrice and Garden Fresh Markets, Inc., agreed to by Beatrice in good faith to meet the equally low prices of a competitor?

F. *Beatrice's Burden as to Cost Justification and Meeting Competition*

Assuming that complaint counsel have established a prima facie case of price discrimination, has Beatrice met its burden of proof by showing either a good-faith meeting of competition or have the price differences favoring Kroger, A & P, and Garden Fresh Markets, Inc., been justified by differences of volume of sale or methods of delivery?

G. *Complaint Counsel's Burden Under Section 2(f) of the Clayton Act*

Assuming that complaint counsel have established a prima facie case of price discrimination by Beatrice that favored Kroger, have complaint counsel proved that Kroger induced or received such prices knowingly or that under such circumstances that Kroger should, in reason, have known that the prices granted to it were not cost justified or that Beatrice was not offering such prices in good faith to meet the equally low price of a competitor?

V. *Identity and Business of Beatrice*

Beatrice Foods Co. is a Delaware corporation, with its principal office and place of business located at 120 South LaSalle St., Chicago, Illinois (Complaint and Answer, Count I, Par. 1).

It is also a holding and operating company, and on February 28, 1963, had a 100 percent voting power in approximately 15 subsidiary corporations. In addition to these subsidiary corporations, Beatrice conducts a diversified dairy business. Beatrice's chief trade name is "Meadow Gold". It sells milk and other dairy products, grocery products, and agricultural by-products (Complaint and Answer, Count I, Par. 2; Grantham, Tr. 213-14; CXs 50H-O, 51J-O, 52J, K, N, O, 53J-O).

Beatrice has 134 plants for the manufacturing and processing of milk, butter, ice cream, ice cream mixes, dried buttermilk and powdered milk. These plants are located in 33 states. Also, Beatrice has 242 selling branches in 42 states (Complaint and Answer, Count I, Par. 2).

Beatrice's net sales for the following fiscal years were (CX 53C):

Year Ending	*Net Sales*
February 28, 1962	$539,192,494
February 28, 1963	569,487,854
February 29, 1964	606,157,642
February 28, 1965	681,385,124

Beatrice possibly ranks third among the large interstate dairy companies in annual gross sales (Tr. 217).

The parts of the Beatrice organization with which we are principally concerned consist of three plants—one lo-

cated at Clarksburg, West Virginia, one located at Beckley, West Virginia, and a third, which is a manufacturing facility, located at Sandy Lake, Pennsylvania, where Beatrice manufactures the cottage cheese sold by it in West Virginia (CX 16, 54B, 54U). Each of these plants is operated autonomously and makes basic management decisions in response to local conditions (Tr. 254). The Beckley and Clarksburg divisions manufactured the fluid milk products that were sold principally to wholesale grocers (Tr. 453, 1428).

The Sandy Lake, Pennsylvania, plant prior to 1962 purchased substantial amounts of fluid milk in raw form from farmers located in Western Pennsylvania through a selling agency called DCSA (Dairymen's Co-Operative Sales Association). The Sandy Lake manufacturing facility of Beatrice separated the butterfat content of raw milk for use in the ice cream that was manufactured in Pittsburgh. The by-product—nonfat solids—was reduced to powder and was disposed of as a distress item under government-supported parity (CX 54U; e.g., RBX 121B, D; Tr. 404-06, 435-36, 2468-69).

VI. *Identity and Business of Kroger*

Respondent Kroger is now, and for many years has been, engaged in the operation of a large chain of retail grocery stores (Complaint and Answer, Count I, Par. 4; CXs 155D-E, J-K, 156D-E, J-K, 158D-E). In terms of sales, Kroger ranks third nationally among the large retail grocery chains (Tr. 932). It is estimated that on December 28, 1963, it operated 1,424 retail grocery stores in more than 24 states. These retail grocery stores sell fluid milk and other dairy products, other food products, and a variety of nonedible

household products. Kroger's operations are highly integrated and include manufacturing, processing, distributing, and retailing (Complaint and Answer, Count I, Par. 4; CXs 155E, 156D-E, 157E, 158D-E). Kroger's net sales amounted to:

$1,842,342,667 in 1961
1,947,570,909 in 1962
2,102,106,248 in 1963.

(Complaint and Answer, Count I, Par. 4).

Kroger's retail grocery stores are operated through a number of division headquarters. Each of these division headquarters serves from approximately 30 to 100 stores (Tr. 932-33). The commodities sold by the individual stores of the Charleston division are all purchased centrally through the division's purchasing offices. No products are purchased at the store level by the store manager. Some products are, at times, purchased by the division through central purchasing facilities operated by Kroger at a level above the Charleston division. The Charleston division operates central warehousing facilities in Charleston, West Virginia from which it disperses most of the products sold by the individual stores (Tr. 755-57). In the case of fluid milk and other dairy products, however, during the period covered by the Beatrice-Kroger agreement, delivery was made directly to the individual Kroger stores by the suppliers (Tr. 766-67).

The Kroger stores involved in this proceeding were located in the company's Charleston division (CX 88). During the relevant period, that division included 35 stores in West Virginia, five in eastern Kentucky, and four in east-

ern Ohio (CX 60; Complaint and Answer, Count I, Par. 4). Proof of the alleged unlawful price discriminations was limited, however, to customers of Beatrice located entirely within the State of West Virginia.

VII. *The Products Involved and the Methods of Sale and Delivery*

Although the complaint charges Beatrice with discriminations in the sale of "fluid milk and other dairy products", the evidence in this proceeding is limited principally to the products of milk and cottage cheese. And the principal charge is concerned with the sale of those products by Beatrice to Kroger under an agreement made on April 9, 1962, whereby Beatrice furnished those products to Kroger marked with Kroger's private label under a "limited" or "stripped" service agreement as distinguished from a full-service agreement (CXs 36, 37, 39, 43, 63). By agreement between counsel, the period of discrimination was limited to June 1962 through October 1963 (Tr. 159).

There is a substantial difference between limited service and full service. Under a full-service agreement, a deliveryman visits a particular store at least once every workday (Tr. 490-91, 715). Upon arriving at a store, the deliveryman goes to the dairy case and rotates the milk in the case so that the older milk is placed in the front. After he decides how much milk and other dairy products are needed, he writes out the order therefor and returns to his truck to procure the particular items on the order. He then goes back into the store and fills the dairy case. He may wait while the store personnel checks the delivery and totals the sales ticket. After that, he waits either for payment or for his sales ticket to be signed (Tr. 716, 847-48, 876, 1428-

29, 1607-08). He accepts merchandise returned to him "for any reason", loads it on his truck, and transports it back to his plant (Tr. 716, 876) where he totals his receipts and monies before he turns them in to his office (Tr. 1478).

In contrast, the limited-service agreement between Beatrice and Kroger provided for Kroger to order its needed milk and cottage cheese 2 days in advance of delivery. It also restricted deliveries to once a day for five days a week. The delivered products were placed at the individual Kroger store's dock but no indoor service of any kind was rendered by the deliveryman. In addition, invoices were received at Kroger's central office (CX 90; Tr. 716, 1429-30, 1488, 1490-91). The terms of the agreement placed the responsibility for advertising the Kroger-labeled product upon Kroger. Moreover, Kroger's privilege of returning merchandise that was damaged by the supplying dairy during delivery was restricted; and the loss on any unsold products delivered in accordance with applicable shelf-life conditions was suffered by Kroger (Tr. 509-10, 727, 1430; CX 90).

Under the terms of the contract, Kroger also purchased merchandise from Beatrice bearing Beatrice's own brand names, "Meadow Gold" and "Greenbrier", but Kroger paid the full list price for such merchandise (Tr. 718-19, 729).

VIII. *Reasons Given by Kroger for Wanting Private-label Milk*

In November 1961, Mr. Dickinson (now deceased), the grocery merchandiser of Kroger's Charleston division, contacted Mr. Francis X. Casserly, then manager of Kroger's Dayton dairy plant and grocery merchandiser for the Co-

lumbus division and since then responsible for Kroger's private-label dairy operations, to inquire about the private-label-milk program that the Columbus division was then operating (Tr. 587-88). As a result of that discussion, a plan was initiated for a private-label-milk program in Kroger's Charleston division.

The interest of Kroger's Charleston division in a private-label-milk program, late in 1961, was prompted by a variety of reasons. The dairy cases in the Kroger stores were described as looking like "a jungle". Each displayed the products of at least four, and sometimes five, different suppliers, including Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, Fairmont Foods Company, and Beatrice (Tr. 685-86, 589). Because each of the various brands had so little space in Kroger's cases, the drivers for the various companies might return several times a day to make sure their products were in supply. Such a practice was described as a "nuisance" to Kroger and "an expense to the companies" (Tr. 715). The private-label agreement was intended to eliminate these conditions (Tr. 715-16).

As an additional problem, some Kroger stores carried brands that were not sold in the majority of the stores in the division (Tr. 784). The large number of suppliers to the stores, together with the absence of a division-wide brand, discouraged Kroger from divisional advertising of dairy products (Tr. 685-86, 778-79, 784-85). Another consideration stated by Kroger's representatives was the fact that the various brands of milk being sold by Kroger were too costly to permit Kroger to compete profitably with the numerous local price cutters who were then active throughout the Charleston division (Tr. 777-78; e.g., RBXs 100-

130D, 131-56, 181-83, 185-86, 188-93, 195, 197-99, 202, 206, 209).

In late November 1961, Mr. Casserly met with Mr. Dickinson and Mr. Arnold Scherz, the Kroger vice-president in charge of the Charleston division (Tr. 590). Those officials decided that there should be only the Kroger label and one other brand of milk in each store, with the high-volume item, homogenized milk in gallon jugs, available solely under the Kroger label (Tr. 629-30, 685-87, 715). It was also decided that the private-label merchandise should receive preferential space in the dairy cases of each store (Tr. 687).

When Mr. Casserly undertook to develop such a program, the published price lists of the dairy processors who served the geographic area encompassed by Kroger's Charleston division applied only to those brand products that were delivered under the regular- or full-service agreements (CXs 377G, 377L, 377R; RBXs 123A, 123I, 123J). None of those lists contained any references to prices of private-label merchandise or to merchandise furnished under a limited or stripped service; all retailers of milk in the market area of the Charleston division were buying brand-name products and were receiving either full or regular service (CXs 377G, 377L, 377R; RBXs 123A, 123I, 123J; Tr. 782-83, 812, 847-48, 876-77, 896, 913-14). The idea of private-label milk was novel in the territory (Tr. 591-92).

IX. *Sequence of Events Leading to the Beatrice-Kroger Agreement*

A. *The Selection Process and Initial Meeting*

After meeting with the personnel of Kroger's Charleston division in December of 1961, Mr. Casserly, who was the Kroger official responsible for private-label operations, notified Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, and Fairmont Foods Company, all of whom operated in West Virginia, that Kroger was interested in receiving proposals for a private-label-milk program on a stripped-service basis (Tr. 589-91, 715).

Mr. Casserly first contacted Broughton Farm Dairy through its president, Mr. Carl Broughton, and on November 30, 1961, he had a preliminary discussion with Mr. Broughton about supplying private-label milk to Kroger (Tr. 590, 943; CX 100). At that time Broughton was selling its dairy products to 12-14 Kroger stores in the Charleston division and was selling private-label milk to seven Kroger stores in Kroger's Columbus division at 20 percent off list prices under a full-service agreement (Tr. 946-47, 594, 596, 717-18).

Near the same date as stated above, Mr. Casserly or Mr. Dickinson telephoned Mr. J. William Martin, general manager of the Valley Bell Dairy, and arranged an appointment with him to discuss a private-label proposal (Tr. 590, 889). At that time, Valley Bell was serving 23 Kroger stores in the Charleston division (CX 135C-D). The following day, Mr. Casserly, along with his plant accountant, Mr. Jack Nicely, met with Mr. Martin and his brother at the Valley Bell plant (Tr. 590, 889; CX 132). At that meeting, Mr. Martin informed Mr. Casserly that he had several

reservations regarding the submission of a private-label quotation, although he said that he would like to consider the matter further (Tr. 891; CX 132). Mr. Casserly told Mr. Martin that he would be happy to answer any of Valley Bell's questions (Tr. 891). It is doubtful that Valley Bell was ever seriously interested in the program; but if it was, its interest applied to only 27 of the 44 Kroger stores in the Charleston division (CXs 134-137).

In early December 1961, Mr. Casserly telephoned Mr. Paul R. Dew, the central division manager of Fairmont Foods Company (Tr. 590-91, 801, 803). At that time Fairmont was selling dairy products to some 28-30 Kroger stores (Tr. 817). On December 4, the two men met in Dayton, Ohio, and discussed the possibility of Fairmont's submission of a private-label proposal (CX 116). Mr. Casserly and Mr. Dew met again in Dayton in early January 1962 (Tr. 803).

It was either in December 1961 or early January 1962 that Mr. Casserly invited a proposal from The Borden Company, which was then a supplier of seven Kroger stores (Tr. 591, 600, 857-58, 865).

Although Beatrice was serving 26 Kroger stores in West Virginia at that time, Beatrice was not invited to submit a proposal. Beatrice was not considered by Mr. Casserly as prepared to furnish milk in the type of containers that Kroger desired (CX 29C; Tr. 365-67, 369-71, 487, 591). When Beatrice heard rumors of Kroger's interest in a private-label-milk arrangement, it took the initiative and contacted Kroger (Tr. 365-67, 485-86).

It was late in December 1961 that Mr. Hugh Hutchinson, Beatrice's Appalachian district manager, and Mr. George

Stollings, the manager of Beatrice's Beckley plant, contacted Mr. Scherz, vice-president of Kroger's Charleston division; and on January 2, 1962, they met with Mr. Scherz in Charleston (Tr. 365-67, 486). Mr. Scherz advised the Beatrice representatives to communicate with Mr. Casserly because Mr. Casserly was in charge of the private-label program (Tr. 486). Mr. Stollings immediately telephoned Mr. Casserly and they agreed to meet on January 12, 1962 (Tr. 368-69, 486; CXs 26, 87). Beatrice, however, was not invited to submit a proposal until after Beatrice's officials had persuaded Mr. Casserly that Beatrice was able to meet Kroger's container requirements (Tr. 371-72, 486-87).

B. *Communications Between Kroger and the Prospective Suppliers During January-February 1962*

After Mr. Casserly had invited proposals for a private-label, stripped-service agreement, the various dairies so invited continued to promote their companies' interests by telephone communications and personal meetings with Mr. Casserly. In the course of the discussions, continuous "fencing" went on among the parties (Tr. 595, 601, 668-70). The dairies were trying to learn more about the limited service which Mr. Casserly wanted, about the volume he required, and about the elimination of promotional activity on their part. They were particularly interested in the identities of competing dairies and the prices they were proposing (Tr. 595, 668-70). Mr. Casserly informed the interested dairies of the names of the other dairies that he was considering, and he also gave them some general information concerning the proposals that he had already received (Tr. 370-71, 487, 595, 702, 715).

On January 6, 1962, Mr. Robert Hurst, vice-president and production manager of Broughton Farm Dairy, sent a letter to Mr. Casserly in which he offered discounts approximating 20 percent from its list prices for Kroger's private label products—with regular service to Kroger but without promotional allowances (Tr. 694, 945; CXs 103-104).

Mr. Casserly informed all other dairies of Broughton's proposal of about 20 percent off list price (Tr. 375, 487-88, 595-97, 702-03, 716-17). This was the same discount at which Broughton Farm Dairy was supplying a private-label product on a full-service, nonpromotional basis to Kroger in a nearby area (Tr. 591, 596, 717-18). The other dairies were likewise informed that Kroger expected a lower price than 20 percent off list because of the larger volume of milk Kroger would require, because Kroger would require only a limited service, and because of the deterioration of milk prices in the Charleston market (Tr. 596-97, 602-03, 716-18). Mr. Casserly testified, however, that Kroger had no definite "figure in mind" (Tr. 596) because he did not "know the costs of these particular people who were competing . . . . " (Tr. 597). Apart from the initial Broughton offer, Kroger never informed the bidding dairies "what their competitors had bid on the contract . . . . " (Tr. 375, 487-88, 595-97, 702-03, 716-17).

On January 12, 1962, when the Beatrice representatives —Messrs. Hutchinson and Stollings—held their first meeting with Mr. Casserly (Tr. 368-69, 486-87), they informed him that they had a Pure-Pak machine at their plant in Paintsville, Kentucky, which was not in use, and that it could easily be transferred to Beckley to pack Kroger's private-label milk (Tr. 371-72, 487). Mr. Casserly then in-

dicated that he would be willing to receive a proposal from Beatrice (Tr. 487).

In the course of the meeting, the Beatrice representatives learned that Fairmont Foods Company and Broughton Farm Dairy had previously met with Mr. Casserly; that Broughton was furnishing private-label milk to Kroger's Columbus division at 20 percent off list; and that Broughton had already made a similar proposal for the Charleston division (Tr. 375, 495, 595-96, 702-03, 716-17). The Beatrice representatives had come to the meeting prepared to offer Kroger 15 percent off list, but when they learned of Broughton's proposal, they did not make the offer (Tr. 488). However they did obtain an indication of the sales volume that could be expected under a private-label agreement for the Charleston division (Tr. 489), and this led them to begin evaluating their contemplated proposal in terms of limited service (Tr. 489-90).

The deteriorating wholesale prices of milk in Charleston disturbed Messrs. Hutchinson and Stollings (Tr. 490-91) so that following the January 12, 1962, meeting with Mr. Casserly, they began thinking in terms of a formula proposal based upon manufacturing and distributing costs, plus profit (Tr. 379, 490-91). Because of the large volume of milk that Kroger would require, they wanted to make sure that this anticipated increased business could be handled at a profit " . . . regardless of what happened in the market place . . . " (Tr. 488-91). Having conceived this idea, they then decided to schedule another meeting with Mr. Casserly in the near future to discuss it with him (Tr. 379, 490).

On January 18, 1962, Mr. Casserly formally invited proposals on private "Kroger label fluid milk and cottage cheese" from Valley Bell, Borden, Broughton, Fairmont,

and Beatrice and simultaneously furnished them with a written estimate of the volume of business involved, stating that Kroger's sales of those products had exceeded $2,000,000 during the preceding year (CXs 88, 105, 117). The dairies were reminded that Kroger itself would perform the servicing functions for their merchandise (CXs 88, 105, 107).

On January 25, 1962, Messrs. Hutchinson and Stollings of Beatrice again conferred with Mr. Casserly (Tr. 379, 490). The discussion covered the limited service that Kroger desired; the pre-ordering procedure Kroger would follow; Kroger's curtailment of the customary number of delivery days; and a plan for a centralized billing procedure (Tr. 491). In the course of that meeting the Beatrice representatives proposed a $0.21 per pound price on cottage cheese, to which Mr. Casserly responded that they were not "in the ballpark" on that basis (Tr. 380-81, 491-92). No other prices were mentioned at the meeting (Tr. 380-84, 491-92). They did discuss, however, Beatrice's preference for quotations based upon a cost-plus formula built up from raw-milk prices (Tr. 490-91). To the surprise of the Beatrice representatives, this suggestion was attractive to Mr. Casserly (Tr. 490-91). Mr. Casserly preferred a cost-plus formula because he stated that an "off list" basis placed too much control in the hands of the suppliers, who could set their list prices to serve their own purposes (Tr. 606, 628).

A third meeting between Mr. Casserly and Mr. Dew, the representative for Fairmont Foods Company, was held in early February 1962 (Tr. 803). During the course of that meeting, Mr. Dew made no proposal (Tr. 803). Instead, he reviewed the types of bids that might be acceptable to

Kroger and emphasized the cost-justification procedures that would have to be utilized to arrive at a lawful bid (Tr. 803).

Shortly thereafter, Mr. Dew sent Mr. Casserly two memorandums prepared by Fairmont's counsel (CX 118). Those documents discussed the necessity for cost justification, and other features of the contemplated bid to Kroger, from the standpoint of insuring Fairmont's compliance with the Robinson-Patman Act (CX 118). One of the memorandum also discussed various types of savings that might be realized by including in a private-label agreement provisions that would relieve Fairmont of expenses for advertising, billing, servicing, and delivering. Because of these savings, Fairmont stated that its prices could be cost justified (CX 118I-K).

The Beatrice executives next met with Mr. Casserly on February 9, 1962 (Tr. 386-88, 494). On that occasion, they gave him a promotional brochure that contained all the elements of a proposal to supply private-label products to the Charleston division except that no prices were filled in on the attached price sheet (CXs 89, 386-389; Tr. 386, 494, 663-64, 669). The brochure informed Mr. Casserly that Beatrice had successfully supplied private-label milk in other areas; that the merchandising and advertising of the Kroger label was to be entirely in Kroger's hands and at its cost; that the Beatrice quality-control laboratory, which checked both the raw-milk supply and the finished products, was the only dairy-plant laboratory to be certified as a government approved laboratory in the State of West Virginia; that only one additional route would have to be added to serve the entire division; that there would be only five delivery days each week; and that there would be cen-

tral billing through Kroger headquarters (CX 89A-D). In addition to the brochure, they suggested a price of $0.71 for a gallon jug of milk. Mr. Casserly at once replied that if they could not do better than that, they "might as well go back home" (Tr. 388-89, 495, 668-69, 702-03, 716-17). He again referred to his previous advice that he had already received a quotation from Broughton Farm Dairy in the neighborhood of 20 percent off list (Tr. 495, 668-69, 702-03, 716-17). No other prices were quoted by Mr. Casserly (Tr. 389, 495-96). The Beatrice officials indicated that they wanted to reevaluate their proposal and would return at a later date (Tr. 495-96).

C. *Proposals in February 1962*

On February 12, 1962, Broughton Farm Dairy submitted another offer to Mr. Casserly (Tr. 602-04; CX 106). Unlike the previous proposal, which reflected a discount from list prices, this offer was based upon the fluctuating cost of raw milk, plus a fixed differential for processing, packaging, delivery, and profit (CX 106A-B). It was the first formula quotation received by Mr. Casserly.

On February 22 or 23, 1962, Fairmont Foods Company submitted its first formal proposal to Kroger (Tr. 803-04, 620-22; CXs 119-122, 125, 126). This proposal consisted of various parts, including the following:

> (1) A document entitled "Why Fairmont", which set forth some 15 reasons why Fairmont should be awarded the contract, including "Quality Control, Standard Cost System & I.B.M. Accounting", experience in supplying private-label-milk products, the availability of "full time merchandising and advertising assistance", and the like.

(2) The Annual Report of Fairmont for the fiscal year ended February 28, 1961.

(3) A map locating the processing plants and sales and distribution branches of Fairmont and the Kroger stores in the Charleston division.

(4) A price list for each of 15 Kroger stores, embodying list-price discounts ranging up to 22.5 percent for fluid milk and 26.5 percent for cottage cheese.

(5) A summary and analysis based upon the assumption that Fairmont could serve 75 percent of Kroger's milk needs.

This proposal advised Kroger that if a responsible supplier offered lower prices, Fairmont would meet such an offer on the same terms, provided it could make at least a 5 percent profit (CX 125B).

On February 22, 1962, Valley Bell Dairy purportedly offered to serve 29 stores in the Charleston division (CXs 136, 137). The Valley Bell offer was not responsive to Mr. Casserly's invitation for proposals based upon limited service (Tr. 659). It was an offer to furnish its products to Kroger on the same basis and at the same prices then prevailing with respect to the same products sold under the Valley Bell label (Tr. 893; CX 137). Among the five dairies invited to submit proposals for Kroger's private-label program, only Valley Bell—in declining to do so—asserted that there was no cost justification for any reduction from the prices for its branded products (CX 137A-B). Mr. Casserly, according to his testimony, was advised that Valley Bell's actual difficulty was that its accounting system did not permit either cost allocation or the ascertainment of unit costs (Tr. 659, 914-15).

D. *Proposals in March 1962*

At its meeting with Mr. Casserly in late February, Fairmont Foods Company indicated that it was considering the submission of cost-plus quotations related to raw-milk costs; and on or about March 5, 1962, it submitted such a proposal (Tr. 622-23, 626-28, 650, 804; CXs 123, 124, 127, 128). This repeated its earlier off-list offer and, in addition, offered an alternative cost-plus proposal, labeled "Custom Processing and Delivery", under which Fairmont's prices would vary with fluctuations in raw-milk costs (Tr. 650, 804-06, 845-47; CXs 123, 124). This alternative specified six different milk and cottage cheese prices spread among different market areas; a seventh price, applicable only to the Huntington area, was subsequently inserted apparently because a mistake had been made in computing the Huntington price (Tr. 634-35; CXs 123, 177).

These cost-plus prices were substantially lower than the previous discount-off-list proposal submitted by Fairmont (CX 123, columns 4 and 5). On the basis of this offer, which included a guaranteed profit, Fairmont expected to be selected as the private-label supplier of the Charleston division (Tr. 805, 846, 849).

Mr. Casserly's understanding of Fairmont's "Custom Processing and Delivery" proposal was expressed, as follows:

> ". . . it is built up upon the anticipated volume and the anticipated savings in delivery and merchandising expenses and advertising which the Fairmont Food Company would experience and this was then reflected in what they call the custom net cost for Kroger label products." (Tr. 654)

Mr. Casserly testified also that besides its previous cost-justification assurances (Tr. 628-29, 630-61), Fairmont at that time had given him a comprehensive cost study ". . . in order to justify the price they were offering" (Tr. 634, 641-42, 654).

On or about March 9, 1962, Broughton Farm Dairy tendered another proposal (CXs 112, 113; Tr. 602, 604-05). This was based upon lower raw-milk costs and reflected substantially lower prices than Broughton's February offer (Tr. 602, 604-05; CXs. 106, 112, 113).

The Borden Company submitted a three-part bid on March 9, 1962 (CX 97). Pricing Plan No. 1 offered prices well below list for both the Kroger and Borden brands, provided the products were picked up at Borden's Huntington, West Virginia, plant and delivered to Kroger stores by Kroger's own trucks (CX 97C). Pricing Plan No. 2 prescribed somewhat higher prices than Plan No. 1, with Borden assuming full delivery responsibility, but providing limited service (Tr. 876-77; CX 97D-J, M). Pricing Plan No. 3 provided for complete store delivery service of Kroger's private-label dairy products and Borden's dairy products with discounts.

Mr. Casserly was advised that the prices in Borden's Plan No. 2 reflected savings attributable to the limited service involved (Tr. 877). The Borden witness, Mr. Robert F. Moore, was able to estimate the savings that could be passed on to Kroger by virtue of his extensive experience in the dairy industry (Tr. 880). He testified as follows (Tr. 880):

"Q. Mr. Moore, in your capacity as District Manager for the Midwestern District, you have had some ex-

perience with limited or stripped service sales, have you not?

"A. Yes. I have had experience with most phases of our business.

"Q. Was it based upon that experience that you were able to estimate what cost savings could be passed along to Kroger?

"A. Correct.

"Q. Under Plan 2?

"A. Correct."

Messrs. Hutchinson and Stollings of Beatrice again met with Mr. Casserly on March 14, 1962, and submitted another proposal to him (Tr. 411-12, 496). By this date, Mr. Casserly had already received the revised proposals of the other dairies (Tr. 700-02, 706). At the outset of the meeting, one of the Beatrice representatives mentioned a $0.68 gallon-jug price—equivalent to a 20 percent discount off prevailing list (Tr. 411-12, 496-97). In the course of the succeeding discussion, Mr. Casserly reminded the Beatrice executives that he knew the milk market was collapsing in Charleston (Tr. 497). He also referred specifically to the interim submission of two quotations from Fairmont Foods Company—one proposed a series of discounts and the other based prices upon a build-up of raw milk costs—but he did not specify the prices actually bid (Tr. 496-97).

Realizing that the award of the contract might hinge on the gallon-jug price—since the "gallon jug was the big volume item"—the Beatrice officials "fenced" with Mr. Casserly about the price Beatrice would have to meet if its bid for the Kroger contract was to be successful. At

this point in the record of the conference there is a conflict in the testimony as to who suggested a lower price of $0.66 for a gallon jug of milk. On the one hand, Mr. Hutchinson testified that Mr. Casserly, independent of any statement either by himself or by Mr. Stollings, wrote that price on the blank price sheet attached to the brochure that had been given to Mr. Casserly on February 9, 1962 (Tr. 413). On the other hand, Mr. Stollings testified that he (Stollings) ". . . quoted the $0.66 price . . ." (Tr. 498). Since Mr. Casserly's testimony on this point accords with Mr. Stollings's, we conclude that Mr. Hutchinson was simply mistaken as to how the final price was first introduced (Tr. 720). As they quoted their prices to Mr. Casserly, he copied them down on the blank price list (Tr. 496-99, 719-20; CX 89N). Based on these prices, Mr. Casserly advised the Beatrice representatives that Beatrice was competitive with other bidders, and he perhaps mentioned Fairmont (Tr. 497-98, 740). During the same meeting, Mr. Casserly and Mr. Stollings, with the aid of a calculator, worked out a formula for computing the fixed differential to be added to the raw-milk cost for milk in gallon jugs and for the other milk products in the line based on the prices that Beatrice had quoted (Tr. 498-99). The formula arrived at was a cost build-up price, as was Fairmont's, with the prices agreed upon fluctuating with the cost of raw milk (Tr. 497-99; CX 89N).

The cottage cheese prices quoted by the Beatrice representatives were $0.35 for a 2-pound package, $0.175 for a 1-pound container, and $0.14 for a 12-ounce carton (CX 89M; Tr. 496). Before proposing those prices, Beatrice had acquired information about the terms of Fairmont's milk procurement arrangements. In addition, it had ascer-

tained from public records that Fairmont had sold cottage cheese to institutional accounts for $0.1615 to $0.18 for the 1-pound size, and $0.1211 and $0.135 for the 12-ounce size (Tr. 381, 392-94, 493). To meet Fairmont's price, Beatrice arranged for the procurement of skim milk in Pennsylvania on purchase terms which would enable it to sell cottage cheese at a price between $0.16 and $0.17 per pound (Tr. 403-06, 2468, 2472-77).

Beatrice's bid, based on "stripped" service, was left by the Beatrice representatives with Mr. Casserly with the distinct understanding that it was not a binding proposal, but was subject to review and approval by Beatrice's legal department (Tr. 502).

Following the March 14 meeting, Mr. Stollings went to Chicago and spent two days reviewing the proposal with Beatrice's counsel and an accounting specialist to determine whether the prices quoted could be cost-justified (Tr. 251-52, 504-05, 2255-56). At the conclusion of this review, Beatrice's counsel decided that the prices quoted to Kroger on March 14, 1962, would be profitable for Beatrice and would be justified in view of the related cost-savings. The submission of the proposal was accordingly approved by Beatrice's counsel (Tr. 2256-65, 2278; RBX 135F). A draft of the proposal and various cost analyses were then prepared by Beatrice's experts in Chicago (RBX 135A-G; Tr. 2256-2265) but none of those documents were ever exhibited to anyone at Kroger (Tr. 2265). On April 9, 1962, Kroger accepted Beatrice's bid (Tr. 511).

E. *Beatrice's Bid Compared to Fairmont's*

After receiving a proposal from each of the dairies contacted, except Valley Bell, Mr. Casserly believed that of all the proposals made in March 1962 the proposals by Fairmont and Beatrice were the most desirable (Tr. 720-22). It was difficult to compare those two proposals (Tr. 635-36, 720-22). Fairmont's proposal contained seven different prices that were based on the March 1961 milk costs in three areas under a Federal Milk Marketing Order, plus milk costs in Charleston, which were not then under a Federal Milk Marketing Order (CXs 123, 124, 128; Tr. 639-40). The Beatrice proposal was based upon average raw milk prices during 1961 in a single Federal Milk Marketing Order and contained uniform prices for all Kroger stores in West Virginia (CX 89M-N). Mr. Casserly turned the proposals over to his accountant for a comparative evaluation (Tr. 635-36, 647, 720-22). Based upon projected volumes and upon the then prevailing raw-milk costs, the accountant reported that the proposals were equivalent in price on fluid-milk items, which were by far the most important products (Tr. 721-22, 843). The only price difference that he could discern between the proposals of the two dairies was in the cottage-cheese item (Tr. 721-22, 843). In contrast to the Fairmont proposal, the Beatrice cottage-cheese proposal was constant and did not fluctuate with milk costs (CX 89N; Tr. 647, 650, 805-06). Mr. Casserly believed that Beatrice's cottage-cheese proposal was lower; and primarily because of that belief, he decided to award the contract to Beatrice (Tr. 721-22, 843). Mr. Casserly was also impressed by the fact that Beatrice had the only certified laboratory in West Virginia, and he

felt that Beatrice could give the Kroger stores in Kentucky better service than Fairmont (CXs 90A, 96A; Tr. 707-08). Mr. Casserly's assumption that Beatrice's bid on cottage cheese was lower than Fairmont's appears to have been in error because of the decline in milk prices (RBX 132A). Actually, Fairmont's price for cottage cheese, during the period covered by the alleged discriminations, would have been substantially under Beatrice's price (RBX 132H).

On April 9, 1962, after Mr. Stollings had obtained assurances from his company's legal and accounting experts that the prices quoted Kroger in March were cost-justified, he met with Mr. Casserly and formally submitted his March offer in the form of a written agreement (CXs 28, 90; Tr. 504-06, 512, 671). And it was at that meeting that Mr. Casserly informed Mr. Stollings that Beatrice was the successful bidder (Tr. 511).

On April 24, 1962, Mr. Casserly inspected the Beatrice facility at Beckley, and this reinforced his conclusion that Beatrice would be able to produce the quality and quantity of products desired by Kroger's Charleston division (CXs 93B, 96A).

On May 14, 1962, Fairmont amended its March 1962 proposal by an offer to reduce its quotations, upon satisfactory proof that such reduction was necessary to meet a pricing formula proposed by another competing supplier (CX 130; Tr. 632, 855). Kroger, however, did not accept the offer (CX 131).

On May 21, 1962, Mr. Casserly informed Fairmont Foods Company, The Borden Company, and Broughton Farm Dairy that their proposals had not been accepted (CX 131).

Initial Decision

Service under the agreement with Beatrice began the first or second week in June 1962, with deliveries to stores located in the Charleston City area (Tr. 674). By the end of that month, Kroger-label products had been distributed throughout the division (Tr. 674).

F. *The Formula for Pricing Milk*

The formula for pricing milk was based upon the average annual Class I price under the Federal Milk Marketing Order for the year 1961. Federal Milk Marketing Orders, which are promulgated by the United States Department of Agriculture, establish the minimum prices that dairy processors pay to dairy farmers in a specified geographic area (Tr. 377). The prices that the processors pay depend on the use they make of the milk. A Class I price is paid by the processors to the dairy farmers for all milk that the processors use as fluid milk (Tr. 2465; CXs 27L-M, 90M-N; Tr. 671-72, 418-20, 422-23, 428, 503, 512-14).

The quoted prices were:

Homogenized V. D. Milk	Gal. jug	.66 Plus	.25 jug dep.
Homogenized V. D. Milk	½ gals.	.378	
Homogenized V. D. Milk	Qts.	.22	

G. *Cottage Cheese Prices*

Cottage-cheese prices were not determined by the formula. These prices under the Beatrice-Kroger agreement were constant. They were (CXs 27L, 90M):

Cottage cheese	12 oz.	.14
Cottage cheese	1 lb.	.175
Cottage cheese	2 lb.	.35

X. *Discount Prices to A & P*

In September 1962, Mr. Russell Pace, a store supervisor for the Columbus, Ohio, unit of A & P, who lived in Beckley, West Virginia, called on Mr. Stollings at his Beatrice office in Beckley (Tr. 1618). Mr. Pace advised Mr. Stollings that he had just returned from a company meeting in Columbus where he and other officials of A & P had discussed a new pricing method that involved three things—a formula, a limited service, and a reduced price that was being offered to A & P by The Borden Company (Tr. 1618-19). Mr. Pace informed Mr. Stollings that A & P was going to accept Borden's offer for Ohio and that he believed The Borden Company would quote the same prices for Huntington, West Virginia, and probably the other parts of southern West Virginia (Tr. 1619). "He [Mr. Pace] indicated that I [Mr. Stollings] should contact their buyer . . . if I was interested in coming up with this type of a pricing arrangement and at the same time I was interested in protecting my business" (Tr. 1623-24). Beatrice at that time was selling milk to A & P in West Virginia.

In response to the above suggestion, Mr. Stollings called upon Mr. Hand, an A & P buyer, and discussed prices with him (Tr. 1624). Mr. Stollings received a copy of Borden's pricing offer to A & P that one of his salesmen had acquired in the field. Thereafter, before submitting a formal bid to A & P, Mr. Stollings, using Borden's competitive price list as a guide, prepared his own formal offer, which he then tendered to A & P (RBX 130F; CX 7). A comparison of the Borden offer, as represented by the price list considered by Mr. Stollings, with Beatrice's price list, as prepared by Mr. Stollings, shows Borden's prices and Beatrice's prices as follows:

	Borden	*Beatrice*
Gallons	.6844	.6827
½ Gallons	.3774	.3942
Quarts	.2312	.2312
2-lb. cottage cheese	.4980	.4150
12-oz. cottage cheese	.2324 (RBX 130F)	.1900 (CX 7)

It is apparent from the above-quoted prices that the bid of Beatrice to A & P was substantially the same as that of Borden. We conclude that the reliable, substantial, and probative evidence shows that the prices offered by Beatrice to A & P in the fall of 1962 were made in good faith to meet an equally low price of a competitor; namely, The Borden Company.

XI. *Discount Prices to Garden Fresh Markets*

Complaint counsel asked for no findings of fact relating to Beatrice's sales to Garden Fresh Markets; furthermore, the uncontradicted evidence shows that the officials of Garden Fresh Markets represented to Beatrice on several occasions that Garden Fresh Markets had been offered milk and dairy products at lower prices than Beatrice had been charging. In view of these facts, we find no unlawful price discrimination by Beatrice in its sales to Garden Fresh Markets (Tr. 1581-82, 1585-86; RBX 134B, E-F).

XII. *Like Grade and Quality*

The uncontradicted evidence shows that there was no difference between the milk and other dairy products packaged under Beatrice's "Greenbrier" and "Meadow Gold" labels and that packaged under Kroger's private label (Tr.

394-95, 446-48). Moreover, counsel for all parties stipulated that the milk and dairy products packaged by Beatrice and sold to Kroger under Kroger's private label and the milk and dairy products packaged by Beatrice and sold to other customers under its own brand names were from the same plants and were of like grade and quality (Stipulation, Tr. 451).

XIII. *Commerce in Sales to Kroger and A & P*

A. *Price to Each Kroger Store Dependent Upon Cost of Serving Entire Division in a Three-state Area*

As previously stated, Kroger's Charleston division consisted of approximately 44 stores located in a three-state area, which included portions of the States of West Virginia, Ohio, and Kentucky. Nine out of the 44 stores were located in the States of Ohio and Kentucky (CXs 60A-D, 141). The agreement between respondents Beatrice and Kroger provided that the pricing was to be based ". . . upon a unit cost at our [Beatrice's] dock at our Clarksburg and Beckley plants, plus an average cost per unit to deliver these products on our trucks to the store door of each of the forty-four stores . . ." in Kroger's Charleston division (CXs 28C, 90C; Tr. 507-09, 673-74). Thus, every sale that was made by Beatrice to a Kroger store under this agreement was made in interstate commerce because the price to each store was dependent upon the average cost of serving all of the stores of the Charleston division, some of which were located outside the State of West Virginia where the Beatrice plants serving them were located.

B. *All Cottage Cheese Was Transported Across State Lines*

All of the cottage cheese Beatrice sold to Kroger under its private label, as well as all other cottage cheese sold by Beatrice's Beckley and Clarksburg, West Virginia, plants, was manufactured at Beatrice's plant at Sandy Lake, Pennsylvania (ARA, Fact No. 10, p. 21). Thus, all of the cottage cheese was transported from Pennsylvania into West Virginia for delivery throughout the area of Kroger's Charleston division. The amount of such sales to Kroger was substantial (ARA, Fact No. 10, p. 21; CX 48A-W; RBXs 132A-J, 121A-D, 122A-B; CXs 361A-L, 362A-C, 364-75, with subparts).

C. *A Substantial Portion of Beatrice's Raw-milk Supplies Was Transported Across State Lines*

Beatrice's Greenbrier plant in Beckley, West Virginia, supplied the majority of Kroger stores involved in this proceeding (ARA, Fact No. 1, p. 2; CXs 90B, M, 29A-E; Tr. 432-34, 522). In the year 1962, 37.5 percent of the raw-milk supply for this plant came from out-of-state sources (CXs 49A, 47B(A. 10); Tr. 443-44). In the year 1963, 24 percent of its raw-milk supply came from out-of-state sources (CXs 49B, 47B(A. 10); Tr. 443-44).

The Clarksburg plant of Beatrice, which supplied the five Kroger stores (Tr. 522), purchased some raw milk from out-of-state sources after the Beatrice-Kroger agreement on a private-label program. This was a temporary emergency supply required because of the private-label program with Kroger (Tr. 527-28).

D. *Negotiations for and Execution of the Beatrice-Kroger Agreement Occurred at an Interstate Level*

The fluid milk and cottage cheese sold by Beatrice to A & P were from the same general sources as the milk and cottage cheese supplied to Kroger; and, as previously shown, a substantial part of that supply crossed state lines. Furthermore, as previously shown, the negotiations between Beatrice and A & P were at an interstate level.

E. *Sales Under the Beatrice-Kroger Agreement Involved the Interstate Operations of Both Parties*

Finally, the Beatrice-Kroger agreement involved the integration of activities and the combined operations of respondent Beatrice's processing, manufacturing, and distributing systems over a four-state area, including parts of West Virginia, Kentucky, Ohio, and Pennsylvania. Cottage cheese was manufactured in Pennsylvania and transported to Clarksburg and Beckley, West Virginia. The combined operations of the Clarksburg and Beckley plants, as well as the manufacturing facilities of the Sandy Lake, Pennsylvania, plant, were necessary to supply all the Kroger stores in the Charleston division with cottage cheese. This combined operation resulted in a distribution system covering the entire tri-state area of Kroger's Charleston division (ARA, Fact No. 10, p. 21).

For Kroger's part, one of the principal reasons for its entering into this private-label agreement was to enable it to set up a division-wide, promotional-sales program for milk and cottage cheese throughout the tri-state area of its Charleston division (Tr. 779). For this reason, Kroger considered it important to have a single supplier who could serve it on a division-wide basis (Tr. 780).

XIV. *Duration of Agreement and Areas Involved*

A. *Duration of Agreement*

Under the formula in the agreement, the prices for milk applied to all Kroger stores of the Charleston division, with the exception of five stores in the State of Kentucky. The prices to the Kentucky stores differed from the prices to the West Virginia stores because milk in Kentucky was sold under a local pricing law (CX 90N; Tr. 508).

The same pricing formula remained in effect throughout the term of the agreement, that is, from June 4, 1962, until approximately January 1966, when the agreement terminated (Tr. 438, 512). (As previously observed, however, the discriminations were limited to the period from June 1962 through October 1963.) The prices of cottage cheese were increased at a later date, but not until after October 1963 (CXs 27L-M, 90N-O; Tr. 513-14, Stipulation Tr. 73, 117-18; RBX 132A-F).

B. *Market Areas Affected*

The major dairies—Beatrice, Fairmont Foods Company, Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, and National Dairy Products Corporation—offered identical list prices to their customers from 1961 through 1965 within the Ohio, West Virginia, and Kentucky area covered by Kroger's Charleston division (Stipulation Tr. 1395). There were, however, variations in these identical list prices among the various market areas. There are at least seven identifiable market areas within Kroger's "Charleston division", but we are concerned with only five of them, as follows:

1. Beckley
2. Charleston
3. Clarksburg
4. Lewisburg
5. Logan (Tr. 508; CX 90N).

C. *Customers of Beatrice in Competition with Kroger*

Many customers of respondent Beatrice, other than Kroger, were located in the same market areas as the stores of Kroger's Charleston division (RBX 107A-Z-43; CX 37A-I; ARA, Facts No. 4-5, pp. 7-13; ARA, Facts No. 7-9, pp. 16-20; Tr. 439). The evidence shows that a substantial number of these other customers competed with Kroger in the resale of fluid milk and other dairy products to consumers (Tr. 235-37, 751, 757-60, 974-76, 1021-23, 1041, 1067, 1100-01, 1105-06, 1109-10, 1119, 1142, 1144, 1181-82, 1194-96, 1233, 1255, 1288, 1307, 1335, 1341, 1363, 1392, 1394; CX 234G).

D. *Competing Customers Charged the List Price or List Price Less Discounts*

Beatrice's customers, other than Kroger, in the five market areas in West Virginia were either charged the list prices for fluid milk and other dairy products or the list prices less discounts that ranged from 5 to 15 percent (CX 37A-I; ARA, Facts No. 4, 8-9, pp. 7-13, 19-20). As an exception to this rule the A & P stores in the Clarksburg market area, beginning in October 1962, were granted special prices geared to raw-milk prices.

XV. *Injury to Competing Dairies—Primary Line*

Following Kroger's award to Beatrice of its private-label business, the four dairies that had bid unsuccessfully continued to supply their brands to Kroger, but their sales were substantially lower (Tr. 840, 865-66, 902, 947). There is no evidence of record, however, that any of them were financially crippled as a result of losing the bid for Kroger's private-label milk, nor is there any showing that their market share or the market share of any competitor was reduced or that the total volume of milk and dairy products that they sold was lessened or that their profit or the profit of any competitor was lessened. In 1966, Kroger opened its own dairy plant at Springdale, Ohio, and thereafter Beatrice ceased to supply Kroger with private-label milk (Tr. 566-67).

The record shows that Beatrice does not now sell to any of the principal grocery chains in West Virginia. The important market factor is that now Beatrice's competitors supply the milk and dairy products to the major chain grocery stores that Beatrice formerly served: Fairmont now sells to A & P (Tr. 3091); Broughton now sells a private-label milk to Evans, a chain of grocery stores operating throughout Charleston and the Point Pleasant area (Tr. 2331); and the Sealtest Division of National Dairy Products Corporation has acquired the business of Garden Fresh Markets from Beatrice (Tr. 2332). Of the five competing dairies that bid for Kroger's private-label business in 1962, Beatrice's business in West Virginia seems to have decreased the most in the past few years.

There is no evidence of record of primary-line injury by reason of Beatrice's sales to A & P.

In view of the state of the record, we must conclude that there is no substantial, reliable, and probative evidence that the Beatrice-Kroger agreement either lessened competition or injured a competitor. In addition, there is no evidence that such agreement tended either to injure competition or to create a monopoly in the primary line of commerce herein involved. And finally, there does not seem to be a reasonable probability that such injury may occur in the future.

XVI. *Injury to Retailers—Secondary Line*

In an attempt to show injury to competition in the secondary line of commerce resulting from the Beatrice-Kroger agreement, complaint counsel presented a number of witnesses, principally the proprietors of small stores, whose testimony concerning the crucial question of injury may be summarized as follows:

1. Mr. Lonnie R. Norvell, president of Nitro Supermarket of Nitro, West Virginia, testified that, after the introduction of the Kroger brand of milk in the West Virginia market, he thought that his sales of milk increased (Tr. 972, 1008-10).

2. Mr. Michael M. Collias of Charleston, West Virginia, the co-owner of Swan Superette, a grocery store, testified that he did not believe he competed with Kroger during the period of the alleged discrimination (Tr. 1020-29, 1031).

3. Mr. Maurice Stokeley of Logan, West Virginia testified that he operated a small grocery store in Logan, West Virginia (Tr. 1039). Commission Exhibit No. 36 shows

that the sales of Greenbrier milk to Mr. Stokeley (he only used Greenbrier milk) increased substantially after June 1962.

4. Mr. Samuel W. Taylor, who operated a small grocery store in Charleston, West Virginia in 1962 and 1963, testified that after the Kroger private-label milk came on the market he "... enjoyed some of the biggest volume I have ever had in the milk business" (Tr. 1066-67, 1078).

5. Mr. Frank Annie of St. Albans, West Virginia, testified that he was part owner of Annie's Food Market in St. Albans and that the Kroger store nearest his store "... helped me out" (Tr. 1112).

6. Mr. Thomas Lee Cuni of Man, West Virginia, testified that he operated a Piggly Wiggly store in Man, and that after the introduction of the Kroger private-label milk into the market, he saw no change in his milk business (Tr. 1124).

7. Mr. Raymond M. Kohl, who was manager of the Evans Supermarket chain in 1962 and 1963, testified that after the Kroger private-label milk came upon the market, he became much more conscious of milk; and he stated that "... I would agree our milk sales did increase" (Tr. 1170).

8. Mr. Frank McGinley testified that he was affiliated with Star Supermarket in Bell, West Virginia, and that subsequent to the introduction of Kroger's private-label milk in West Virginia, his sales of milk increased (Tr. 1187-88).

9. Mr. Veon C. Cox testified that he was in the retail grocery and meat business in East Rainell, West Virginia, and that after the introduction of the Kroger private-label milk in his community, his sales of milk remained the same (Tr. 1216, 1228).

10. Mr. H. B. Atkinson, Jr. of Beckley, West Virginia, testified that he was a grocery store manager and that subsequent to the introduction of the Kroger private-label milk in his community, his sales of milk had steadily increased in volume (Tr. 1232, 1246).

The testimony of the above witnesses shows the opposite of secondary line injury in the sale of milk in the West Virginia market. Furthermore, the attorneys herein entered into a stipulation that the prospective witnesses complaint counsel had expected to call from Clarksburg, West Virginia, would testify that "the fluid milk and dairy products sales of the retail grocery business with which they are associated were not affected by the introduction of Kroger private label milk and dairy products" (Tr. 3081). From the above testimony, we must conclude that there is no reliable, substantial, and probative evidence of injury to competition in the secondary line and that the alleged discrimination has not lessened competition and has not tended to create a monopoly in the secondary line of commerce in West Virginia; and the evidence shows no reasonable probability that such injury will occur in the future.

XVII. *Determining the Extent of Discriminations*

All parties to this proceeding agree that the Beatrice-Kroger agreement of April 9, 1962, resulted in discriminations in prices between Kroger and Kroger's competitors. Both of the respondents contend, however, that the discriminations were justified by differences in cost, delivery, and service. Determination of the extent of the discriminations, therefore, presents a difficult and important problem. In resolving this problem, we must consider the charges set forth in the complaint, the type and scope of the agreement between Beatrice and Kroger, the products in question, the effect or potential effect of the agreement upon commerce, and the views of opposing counsel that are irreconcilable.

Paragraph Eight of Count I of the complaint charges that:

> "In the course and conduct of its business in commerce, respondent Beatrice has discriminated and is now discriminating in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade."

In the subparagraph of Paragraph Eight, it is alleged that:

> ". . . Beatrice has discriminated in price in the sale of said products by charging many retailer-purchasers, who were and are in competition with the retail stores of Kroger's Charleston Division, higher prices than it charged Kroger's said retail stores. Such differences in price have ranged as high as 32 per cent for fluid milk in gallon containers."

It appears from the above-quoted language that the discrimination complained of was not Beatrice's selling a private-label milk to Kroger, but Beatrice's selling milk to Kroger at prices lower than the prices at which it was selling milk of like grade and quality to other retail purchasers who were, and are, in competition with Kroger.

As we have previously observed, the agreement between Beatrice and Kroger provided not only for the sale by Beatrice to Kroger of a private-label milk at a formula price, but also for the sale by Beatrice to Kroger of its Greenbrier and Meadow Gold brands of milk at regular list prices (Tr. 719). As we have previously observed, the various brands of milk sold by Beatrice were of "like grade and quality". Under the contract with Beatrice, Kroger was simply paying a lower price for one quantity of milk purchased from Beatrice and a higher price for another quantity so purchased.

Although complaint counsel did concede that a substantial quantity of Beatrice's branded milk was sold to Kroger at list prices during the alleged discriminatory period, they did not include in either their tabulations or their proposed findings the amount of milk sold by Beatrice to Kroger under the Greenbrier-Meadow Gold brands.

Complaint counsel, on one hand, contend that only Kroger's private-label brand of milk purchased by the formula price can properly be considered when calculating the discriminations favoring Kroger. But, on the other hand, Beatrice's counsel contend that the amount of the discriminations favoring Kroger is the difference in the amount Kroger paid to Beatrice for all milk, as compared to the amount Kroger's competitors paid to Beatrice for the same quantity of milk of the same grade and quality.

If the amount of Kroger's purchases from Beatrice of its private-label milk was large and its purchases of Beatrice's branded milk was small, then the effect of including the smaller amount of the purchases with the larger amount to determine the extent of the favored prices to Kroger might be of little consequence. If, however, a large amount of Kroger's purchases from Beatrice had been Beatrice's branded milk, then the inclusion of this amount in figuring the extent of the favored prices to Kroger would, of course, be substantial.

After we consider: first, that the complaint charged discrimination in the sale of milk, not private-branded milk; second, that all of the milk purchased by Kroger from Beatrice was of like grade and quality; third, that the most important factor in our inquiry was the determination of the total advantage to be gained by Kroger by its agreement with Beatrice; and fourth, that such advantage was substantially lessened or reduced because Kroger was required to pay the list price to Beatrice for Beatrice's branded milk, we are compelled to conclude that realism, fairness, and simple justice require the discriminations in this proceeding to be determined by comparing the average unit price which Kroger paid to Beatrice with the average unit price Beatrice charged Kroger's competitors for an equal amount of milk of like grade and quality.

William R. Lemberg, complaint counsel's only expert witness, is an accountant and an employee of the Commission. He used basic material supplied by Beatrice's accountants in preparing Commission Exhibit No. 390. This exhibit shows in some detail the percentage of discrimination granted to 27 Kroger stores in three different areas. This tabulation, which includes the prices paid by Kroger

for Beatrice's branded milk as well as Kroger's private-label milk, was adopted by Beatrice during surrebuttal. It is a much more conservative estimate of the discriminations granted to Kroger than complaint counsel's discount tabulation that includes only Kroger's private-label milk. This discount tabulation shows that the discriminations in the three geographic areas varied from 9.7 to 30.8 percent and that the average discount granted the 27 stores in the three areas, listed by numbers, was 16.0 percent. We believe that this factual conclusion approximates the actual discrimination favoring Kroger and, accordingly, we adopt it as a factual finding.

XVIII. *Knowledge Chargeable to Kroger*

The record shows that Mr. Casserly, who represented Kroger in the negotiations with officials of the five dairies bidding for Kroger's private-label business, had extensive experience in, and knowledge of, the dairy industry (Tr. 705). He admitted that, in general, he was familiar with the trade discounts and pricing practices prevailing in the area involved in this proceeding (Tr. 694). Mr. Casserly knew he was seeking a price below the price that prevailed in the West Virginia market (Tr. 489). He knew that he had rejected a bid from Broughton Farm Dairy that was based upon a discount of approximately 20 percent below list price (Tr. 595, 567, 602-03). He knew that Kroger probably had the greatest purchasing power of any of the chain grocery stores in West Virginia and that its purchases since 1959 had exceeded $2 million a year (Tr. 760). He also knew that the officials of two of the bidding dairies

had expressed concern about their bids in relationship with the requirements of the Robinson-Patman Act (Tr. 658; CX 118A-R as to Kroger only; CXs 132A-B, 135).

What Mr. Casserly did not know, and he so testified, were the various costs of the different dairies bidding for the contract. We accept his assertion as true. Mr. Casserly knew that Kroger, in seeking a price advantage for milk to be sold under its own private label, was willing to accept a limited service by the supplying dairy, as distinguished from the full service that had heretofore prevailed in West Virginia; that Kroger was willing to assume any expense involving advertising; and that Kroger was willing to provide for a central billing service. Thus, to get the price advantage it sought, Kroger was willing to relieve the successfully bidding dairy of all these expenses. Beatrice gave Mr. Casserly practical assurance that its lawyers and accountants regarded Beatrice's bid as a lawful one. Previously, Mr. Casserly had been advised by Fairmont Foods Company that it regarded its bid with the limited service provisions as cost justified. These facts and others similar thereto must be considered in the light of controlling legal principles.

In *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 71 (1953), the Supreme Court expressly recognized that the seller's "meeting competition" defense is within the compass of the buyer's protection under the "knowledge" specification of Section 2(f):

> "... §2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials re-

> fleet cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§2(a) and 2(b)."
>
> • • • • •
>
> "[T]he inquiry must be into the buyer's knowledge of the illegality."
>
> • • • • •
>
> "[A] buyer is not liable under §2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 71, 73, 74)

The Supreme Court has declared and has restated that Section 2(f) does not preclude a buyer from engaging "in price bargaining". In *Automatic Canteen, supra,* the Court stated:

> "[W]e are unable, in the light of the congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74)

In *FTC* v. *Standard Oil Company,* 355 U.S. 396 (1958), the Court expressly ruled that the "meeting competition" defense validated the lower prices granted to a buyer after protracted price "haggling", by stating:

"The findings as to Ned's, the only one of the 'jobbers' initially to receive the tank-car price *post* Robinson-Patman, are highly significant. After a prolonged period of haggling, during which Ned's pressured Standard with information as to numerous more attractive price offers made by other suppliers, Standard responded to an ultimatum from Ned's in 1936 with a half-cent-per-gallon reduction from the tank-wagon price. The Commission concedes that this first reduction occurred at a time when Ned's did not meet the criteria normally insisted upon by Standard before giving any reduction. Two years later, after a still further period of haggling and another Ned's ultimatum, Standard gave a second reduction of still another cent.

"In determining that Standard's prices to these four 'jobbers' were reduced as a response to individual competitive situations rather than pursuant to a pricing system, the Court of Appeals considered the factors just mentioned, all of which weigh heavily against the Commission's position." (355 U.S. at 403-04)

In the light of the above facts and principles of law applicable thereto, we must conclude that there is no substantial, reliable, or probative evidence that Kroger knew that the prices offered to it by Beatrice were not, in fact, cost justified; and complaint counsel have also failed to prove by substantial, reliable, and probative evidence that Kroger had any reasonable basis to believe that the prices offered to it by Beatrice were not, in fact, cost justified. Accordingly, regardless of the decision concerning the legality of the bid tendered to Kroger by Beatrice, the ac-

ceptance of that bid by Kroger has not been shown to be in violation of the Robinson-Patman Act; and the complaint as to Kroger must be dismissed.

XIX. *Good Faith in Meeting Competition*

In order to reach a just conclusion, the findings as to the facts set forth in this initial decision that relate to meeting competition in good faith must be viewed in the light of court and Commission decisions.

Two specific standards for evaluating the legality of lower prices under the "meeting competition" defense have been definitively established by the Supreme Court. First, the *Standard Oil* decision, *supra,* allows that defense if the lower prices are "reduced as a response to individual competitive situations rather than pursuant to a pricing system . . ." (355 U.S. at 404). This was a reaffirmation of the view expressed earlier by the Supreme Court in *FTC* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 753 (1945). In that decision the Court stated, in rejecting an attempted defense of a discriminatory pricing system:

> "But §2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Second, in the *Staley* case, the Supreme Court emphasized that Section 2(b) does not establish an arithmetical requirement that the competing prices be equal; rather, the Court was careful to point out that Section 2(b) authorizes the lower prices that the seller extends in the reasonable and prudent belief he would thereby meet "the equally low price of a competitor". As stated in the *Staley* decision (324 U.S. at 759-60):

> "[T]he statute does not place an impossible burden on sellers . . .
>
> "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price . . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

The courts and the Commission have, of course, respected this view. In *Callaway Mills Co.* v. *FTC,* 362 F.2d 435, 443-44 (5th Cir. 1966), the court held:

> ". . . CC need not show its prices were *in fact* equal to those of competitors, but must only show facts which would lead a 'reasonable and prudent person' to believe that the granting of lower prices would in fact meet the equally low price of a competitor. FTC v. A. E. Staley Mfg. Co., supra."

(The Commission did not seek review of this decision.)

The Commission has repeatedly reiterated the foregoing teaching of the *Staley* case. In the Federal Trade Commission's opinion in *National Dairy Products Corporation*, Docket No. 7018 (July 28, 1966) at page 20, it recognizes that ". . . it is true that a seller claiming the meeting competition defense is not required to prove that its prices were in fact equal to those of its competitors . . . ." In its opinion in *Knoll Associates, Inc.*, Docket No. 8549 (August 2, 1966) at pages 9 and 10, the Commission declared:

> "In *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, the Supreme Court held that 'Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's.' And we have defined the standard of good faith as 'simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.' *In the Matter of Continental Baking Company*, Docket 7630 (December 31, 1963)."

The Commission in *Forster Mfg. Co., Inc.*, Docket No. 7207 (Remand Decision, July 23, 1965), at page 14, stated that:

> "The ultimate legal issue, however, is not whether respondents were in fact meeting competition, but whether they have shown, under the standard laid down in *Staley, supra*, 324 U.S. at 759-760, 'the existence of facts which would lead a reasonable and

> prudent person to *believe*' the granting of that discriminatory price 'would in fact meet the equally low price of a competitor.' (Emphasis added.)"

In other opinions, the Commission has expressed its views of the standard of conduct comprehended "by the reasonable and prudent" standard of conduct for purposes of Section 2(b). In its opinion on remand in *Tri-Valley Packing Association,* Docket No. 7225 (July 28, 1966) at page 16, the Commission stated that this standard contemplated the seller's use of "reasonable diligence in verifying the existence of a lower price of a competitor and that the discrimination was made in good faith for the purpose of meeting such lower price."

The "flexible and pragmatic" characteristics of the Section 2(b) standards were acknowledged by the Commission in its opinion in *Continental Baking Co.,* Docket No. 7630 (December 31, 1963) at page 2:

> "At the heart of Section 2(b) is the concept of 'good faith'. This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C.* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746, 759-60; see *Standard Oil Co.* v. *F.T.C.,* 340 U.S. 231, 249-50. Such a standard, whether it be considered 'subjective' or 'objective', is inherently *ad hoc.* Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application."

The record shows that the five dairies interested in procuring the contract to supply Kroger with its private-label milk, endeavored by various means, during the latter part of 1961 and the early part of 1962, to ascertain who their competitors were and what prices they were offering to Kroger. Each of the five dairies was, during that period, a supplier of milk to some of the Kroger stores, and the officials of each dairy knew that their dairies would lose some of their business if they failed to procure the important Kroger contract.

The evidence shows that in the final stages of that competitive race the officials of Beatrice realized that they were in a ". . . situation of competitive necessity . . . ." The evidence shows, nevertheless, that Beatrice's officials proceeded with caution and business acumen and that they made their winning bid in the belief that they were bidding in good faith to meet a competitive bid of Fairmont Foods Company. The precedent decisions cited above sanction the competitive conduct of Beatrice, "[a]nd [the Commissioners] have defined the standard of good faith as 'simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.'" *Knoll Associates, Inc., supra.*

The facts show that Beatrice's officials conformed to that standard. Consequently, we are compelled to conclude that Beatrice did not violate Section 2(a) of the Robinson-Patman Act by securing the Beatrice-Kroger contract of April 9, 1962. Accordingly, the complaint herein must be dismissed both as to Beatrice and as to Kroger.

XX. *The Cost-justification Defense*

A. *Reason for Evaluating Cost-justification Defense*

The prior conclusions of the hearing examiner were that the complaint herein must be dismissed; an evaluation of the cost-justification defense is, therefore, unnecessary to this decision except for the desirability of presenting to the Commission the hearing examiner's views on all important evidentiary problems of record.

B. *Cost Study Not Admissible as to Kroger*

The cost study that was presented by Beatrice was received in evidence as to Beatrice and the Commission, but was not received as to Kroger. This ruling was based upon the fact that the documents in the cost study came entirely from the records of Beatrice, none of which were shown to the officials of Kroger or were made available to them at the time of the negotiations for the Beatrice-Kroger agreement in 1962. We must remember that the issue as to Kroger and cost justification is not whether Beatrice's prices were, in fact, cost justified, but whether Kroger at the time of the agreement in 1962 knew, or in reason should have known, that the prices were not cost justified. Accordingly, the motion made by complaint counsel to receive the cost study against Kroger is denied.

C. *Identity and Qualifications of Authors of Cost Study*

The cost study was prepared by Mr. James E. Clayton, president of the Edward B. McClain Co., Inc. of Memphis, Tennessee. Mr. Clayton has been associated with that firm for 11 years (Tr. 1800). In the past, Mr. Clayton's firm

has served 75 to 100 dairies as a cost-accounting consultant. These dairies have had from 10 to 500 dairy routes with the average size dairy having about 40 routes (Tr. 1801, 1861). Mr. Clayton's firm has also conducted cost studies for milk commissions of various states to aid them in establishing dairy prices (Tr. 1807, 1862). In addition, Mr. Clayton's firm has been under contract with the U. S. Department of Agriculture to furnish that Department with cost information that it has collected from its customers. The Department of Agriculture has used this collected data to compile a booklet, published quarterly, about distributors' milk costs and margins (Tr. 1813). It appears, however, that neither Mr. Clayton nor his firm has ever prepared a cost study that involved the same problems as those that are involved in the present case (Tr. 1874). The record is silent as to Mr. Clayton's formal education, either in general or as an accountant.

Mr. Clayton was assisted in the planning of the cost study by Dr. Charles E. French, an agricultural economist of Purdue University (Tr. 2194, 2221). Dr. French evaluated Mr. Clayton's procedures, but he did not participate in the detailed preparation of the cost study (Tr. 2211, 2225).

D. *The Theory of the Cost-justification Defense*

The cost study was designed to show that the discount that Beatrice allowed to Kroger, as distinguished from the discount it allowed to Kroger's competitors, was justified because of differences in the quantity of the product sold to Kroger and also because of the differences in the methods of sales and delivery.

All of the allocations of cost in the cost study were based upon a concept of so-called platform or dock costs. Under this concept, Beatrice determined the dock costs of milk by eliminating from the total sales receipts all distribution expenses (Tr. 1809, 1819).

After Mr. Clayton had described the above method of arriving at the dock costs of milk, he was asked:

> "Q. And, in addition to that, did you perform any other platform costs on a product basis? A. Yes, we did. We actually took all units from the gallon all the way down to the half pint, including all products, and actually arrived at a platform cost based upon cost only. We did not include any administrative expense or profit." (Tr. 1819).

After determining the platform costs, the distribution costs of servicing the three classes of customers, *infra,* were added thereto (RBXs 108-111). The dock costs in terms of percentage for the quarter ending May 31, 1962 (the base period Beatrice determined for Mr. Clayton's computation of dock and distribution expenses) were about 69 or 70 percent of the total receipts at Beatrice's Beckley plant (Tr. 1902). In his cost exhibits, however, Mr. Clayton varied that factor between 70 and 75 percent of the regular price of milk and he explained that he used 74 percent to be "a little conservative" (Tr. 1902).

E. *Three Classes of Customers*

For the purposes of the cost study, Beatrice's customers other than Kroger were divided into three classes based upon their similarity or sameness, as follows:

1. Class I included all customers who purchased milk or milk and other dairy products in amounts between zero and $16 per day. These stores were small stores purchasing on a cash basis (Tr. 1822, 1885, 1887-89, 1897-98, 1914-15).

2. Class II included all customers who purchased milk or milk and other dairy products in amounts between $16 and $28 per day (Tr. 1832; RBX 117).

3. Class III included those customers who purchased milk or milk and other dairy products in amounts between $28 and $54 per day (Tr. 1828, 2181-82).

In addition to the three classes of customers, there were a number of customers whose purchases of milk or milk and other dairy products exceeded $54 per day, but these customers were not included in the three classifications (CXs 396-399). Dr. French in his testimony stated that this small group of customers whose purchases of milk or milk and other dairy products exceeded $54 a day would not materially affect the computation of the much larger group of Class III customers (Tr. 2215). In our opinion, this omission of the larger stores is a defect or deficiency to the discredit of the cost study.

F. *Determining Distribution Cost*

Beatrice's distribution expenses were determined solely from the records of its Beckley, West Virginia, plant (Tr. 1852; RBX 106A). After the records for this plant were studied for the three-month period ending May 31, 1962, certain expenditures were selected as representing whole-

sale delivery and selling costs (RBX 106A). These expenditures were then included in the delivery expenses allocated to customers (Tr. 1851-52). The delivery costs for the quarter ending May 31, 1962, are enumerated as follows (RBX 106A):

Commissions, salaries and wages	$103,122
Operating supplies	411
Repairs	116
Taxes	6,641
Insurance	4,480
Depreciation	437
Services purchased	5,136
Advertising	6,999
General expenses	8,492
Truck costs	51,552
Transport to branches	12,668
Total	$200,054

The distribution expenses were allocated to Kroger and to Kroger's competitors by five methods (RBXs 108A-B, 106F-H, 110A-B). These methods included a flat charge, a volume charge, and a stop-time charge. A flat charge is one applied equally to all customers on a daily or per-stop basis, regardless of the volume provided; a volume charge is a charge applied equally to each gallon or unit delivered to each store; and the stop-time charge is one based upon the time the driver spends at each store (Tr. 1942-46). The allocations were as follows:

1. Stop-time was designated as $0.1832 per minute (RBX 108A-B).

2. An allocation of a flat charge was made of $24.05 per delivery day; volume charge—3 percent; and stop-time charge—$0.1283 per minute (RBX 106F).

3. Allocation of a flat charge—$28.45 per delivery day; volume charge—3.41 percent; and stop-time charge—$0.1195 per minute (RBX 106G).

4. Allocation of flat charge of $0.15 per day; volume charge—3 percent; and stop-time charge—$0.1308 per minute (RBX 106H).

5. Allocation of flat charge of $0.13 per day; volume charge—1.12 percent; and stop-time charge—$0.1557 per minute (RBX 110A-B).

Of the five methods of allocation listed above, only three applied to both the Kroger stores and the competing retail stores. The fourth method of allocation listed, including a flat charge of $0.15 per day; a volume charge of 3 percent; and a stop-time charge of $0.1308 per minute, applied only to competing purchasers in Class I and Class III (RBXs 116A, 113B). The fifth method listed, including a flat charge of $0.13 per day; a volume charge of 1.12 percent; and a stop-time charge of $0.1557 per minute, applied only to Kroger stores (RBX 110A-B). Since the latter two methods of allocation were not used for both Kroger and its competitors, the results found in the exhibits based upon these methods of allocation have no comparable counterparts by which we can compare costs to Kroger with those of its competitors.

In computing the stop-time under the first four methods of allocation listed above, Beatrice divided the total service

time required by its drivers for January 1965 into the sum total of expenditures under the first four methods being allocated (RBXs 108A-B, 106F-8; Tr. 1906-07, 1945). The expenses were then allocated to the quarter ending May 31, 1962 (Tr. 1947-48).

G. *Delivery Times*

Delivery times for individual customers were developed from: (1) stop cards, (2) account cards, and (3) a time-motion study.

Stop cards, as used and defined by Beatrice, were questionnaires filled out by Beatrice's deliverymen of the Beckley plant and its Charleston, Logan, and Lewisburg branches (Tr. 2112, 1431). These cards were filled out by the driver without assistance or supervision, except for written instructions (Tr. 2111). Each of these stop cards described the number of services performed by the driver, including estimates of the time required to service each store he visited during the month of October 1962 (Tr. 2110-12). These cards were prepared in September or October 1964, approximately two years following the period described by the drivers (Tr. 2113, 2118-19). It appears from a comparison of Beatrice's lists of routes (RBX 107) with the stop cards (RBXs 3, 5-29) that not all of the routes served by the Beckley plant and its branches were included in this part of the study.

Account cards, as used and defined by Beatrice, were questionnaires filled out by Beatrice's deliverymen on all routes out of the Beckley and Clarksburg plants and their branches (Tr. 2113-14). On each of these cards were recorded the answers to various questions, including an esti-

mate of the time required to service each customer during the month of January 1965. A separate card for each customer was filled out in July 1965 (RBXs 4, 30-103). In the preparation of these cards, the deliverymen were given general instructions and were assisted by Mr. Clayton and Dr. French (Tr. 2113). Each driver was told that the cards were to be filled out because of a federal investigation and for general accounting purposes (Tr. 2120). The cards referred to private-label milk.

The time-motion study consisted of a 1-day study in which each deliveryman was checked as to his time of arrival at a store, the time he spent in the store, and the time of his departure from the store (Tr. 1973). The time-motion study was conducted in October 1966 on one-third of the routes served by the Beckley plant and its Charleston, Logan, and Lewisburg branches (Tr. 1975-76). Mr. Clayton admitted that there had been " . . . quite a change of the operation of the Greenbrier dairy by October 1966" (Tr. 1976). The report of this study (identified as RBX 19) was not offered in evidence. In view of its limitations, we conclude that the time-motion study does not materially aid the cost-justification defense.

H. *Computation of Earned Discounts*

As previously observed, after Beatrice had determined the total cost of a product, that sum was compared with the regular list price for that product and the difference represented the discount that each customer other than Kroger had earned. Beatrice assumed that all of these customers were charged the full list or regular price, less their earned discount (RBXs 113A-D, 115A-D, 120A-B).

In the case of Kroger stores, however, Beatrice (with the exception of one Kroger store) computed an estimated price based upon the theory that the total sales of each Kroger store represent sales at a discount ranging between 20 and 26 percent off list price (RBXs 108A-B, 110A-B; Tr. 2083-84).

I. *Platform Costs*

Beatrice made no study of the possible differences of platform costs but considered that such costs were the same for all customers—Kroger and competing retail purchasers alike (Tr. 2163-64, 2166-70). Consequently, the only possible difference between the costs of serving the individual Kroger store as compared to the costs of serving one of Kroger's competitors was the difference in distribution costs.

J. *Errors in Estimates*

Beatrice's cost computations were, of course, dependent upon the accuracy of its component parts. Except for the sales figures used, the basic factors of the cost study were generally estimated figures.

The platform costs referred to above were estimates based upon Beatrice's experience in its Beckley plant during the period of March through May 1962. Beatrice in its calculations had not limited itself to determining the differences between the distribution costs to the individual Kroger store and the distribution costs to competing individual retail purchasers; instead, it added the distribution costs to the platform costs for each product and compared the total cost figures to the so-called list or regular prices

in order to determine the earned discounts of each of its customers other than Kroger (RBXs 108A-B, 109A-B, 110A-B, 111A, 113A-D, 116A-D, 117, 120A-B). If the platform costs and the list prices were uniform throughout all of respondent's calculations then this would allow for a comparison between the discounts earned by individual Kroger stores and those earned by individual competing retail purchasers (Tr. 2964-65). Beatrice has, however, varied both the platform costs and the regular prices in its computations of Kroger's earned discounts so that a comparison between Kroger's earned discounts and those discounts earned by competitors becomes confusing and the results become doubtful (Tr. 2964-65).

In only one of the Kroger computations did Beatrice apply platform costs of 74 percent to a Kroger store (RBX 108A). In all other cost exhibits referring to Kroger stores, where common methods of allocation were used, Beatrice applied either 70 or 71 percent platform costs (RBXs 108A-B, 109A-B, 111).

The result of these variations in platform costs was that any possible savings in sales to individual Kroger stores were distorted. For example, if the distribution costs to a particular Kroger store were 10 percent of regular price, and if the distribution costs to a competing retail purchaser were 20 percent of the same regular price, there would be a 10 percent difference in costs in serving the two stores. But under Beatrice's method of comparison, one would add the 10 percent Kroger distribution costs to the 70 or 71 percent platform costs and compare these totals with the regular or list prices to obtain Kroger's earned discount. Then, add the 20 percent costs of servicing the

competing purchaser to the 74 or 75 percent platform costs for Kroger and compare these totals with the regular prices to obtain the earned discount of the competing purchaser. The obvious result is that one total has been inflated because the 10 percent difference in costs in servicing Kroger's stores has been increased to a 13 to 15 percent differential on Kroger's so-called earned discount (RBXs 108B, 109A-B, 110A-B, 113A-B, 116A-B).

The stop-card estimates for October 1962 were not considered very reliable by Mr. Clayton (Tr. 1111-12). He explained that when one has a driver fill out a form, the driver is likely to overstate his time "because he wants his boss to know that he is putting in a full day's work" (Tr. 1811-12). Also, Mr. Clayton admitted that the farther away in time the driver got from the period he was describing, the less reliable were his answers (Tr. 2117). The stop-card questionnaires were filled out two years after the events recorded (Tr. 2132, 2118-19). In the 1-day time study, Mr. Clayton was of the opinion that if one timed a particular driver, the driver would tend to be more efficient and the time he reported would be shorter (Tr. 1811). This opinion was corroborated by the testimony of a Beatrice driver, Bill Darby (Tr. 1486-87). Further, in connection with the 1-day time-motion study of October 1966, Mr. Clayton admitted that conditions had changed substantially on the routes studied since the 1962-1963 period of discrimination involved herein (Tr. 1976).

Complaint counsel's expert witness, Mr. Lemberg, pointed out that many drivers reported estimated service times on their stop cards that he considered to be unbelievable (Tr. 2708-09). Referring to the IBM cards that summarized the information from the stop cards, Mr. Lemberg picked out three samples to illustrate his point. In two

instances the daily sales average was $2.50, and the driver required 25 minutes per day for both deliveries; in the third instance, the daily sale was $1.60 and the driver estimated 20 minutes for delivery (Tr. 2713). Mr. Lemberg observed that Commission Exhibit 396A-T revealed other instances of exaggerated estimates that were similar to these (Tr. 2713).

The account cards, which are similar to the stop cards, are of doubtful reliability. The questionnaires for the account cards were filled out a considerable time after the period described (Tr. 2116). Mr. Lemberg testified that the account cards contained estimated service times that were unbelievable (Tr. 2116). As examples, he cited several instances from just one page of Commission Exhibit 397 in which the estimated service times appeared to be exaggerated. Among the samples cited were estimated service times for two stores in which the drivers' reports claimed delivery times of 30 and 35 minutes for average sales of only $6.30 and $7.24 respectively.

K. *Conclusions on Cost-justification Defense*

Because of the various inaccuracies and estimates in the cost justification documents and the doubtful validity of Beatrice's cost study, we conclude that the cost study is not of sufficient reliability to be accepted as a cost defense. In making this conclusion, we do not find that Beatrice's prices to Kroger during the period of alleged discriminations herein were not cost justified, rather we find that the cost study in evidence fails to furnish satisfactory proof of cost justification.

XXI. *Conclusions*

In summation, the facts herein found and the law applicable thereto require the following ultimate conclusions in this proceeding:

1. The Federal Trade Commission has jurisdiction over the Beatrice Foods Co., a corporation, The Kroger Co., Inc., a corporation, and the subject matter of this proceeding.

2. Although the commodities involved are milk and other dairy products, the evidence is limited primarily to milk and cottage cheese.

3. The time of the alleged discriminations is limited by agreement between counsel to the period from June 1962 through October 1963.

4. The sales by Beatrice to its favored customers involved in this proceeding were made in commerce within the meaning of "commerce" as defined by the Clayton Act, as amended by the Robinson-Patman Act.

5. The discriminations in price that Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets have not substantially lessened competition, tended to create a monopoly in any line of commerce, or injured, destroyed, or prevented competition with any person who either granted or knowingly received the benefit of such discriminations, or with the customers of any of them, nor have such discriminations created a reasonable probability of such an effect. Accordingly, Beatrice has not violated Section 2(a)

of the Clayton Act and the complaint herein against Beatrice and Kroger must be dismissed.

6. The prices that Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets were granted by Beatrice in good faith to meet an equally low price of a competitor. Accordingly, Beatrice has not violated Section 2(a) of the Clayton Act as alleged and the complaint herein against both Beatrice and Kroger must be dismissed.

7. The evidence of cost justification is not of sufficient accuracy and reliability to constitute a defense to a finding of unlawful discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

8. Regardless of findings and conclusions herein as to Beatrice, there is no reliable, probative, or substantial evidence that Kroger knowingly induced or received unlawful discriminatory prices from Beatrice; there is no reliable, probative, or substantial evidence that Kroger knew, or should have known, that the prices granted to it by Beatrice under the terms of the agreement were not, in fact, cost justified; and there is no reliable, probative, or substantial evidence that Beatrice was not offering such prices in good faith to meet an equally low price of a competitor. Accordingly, Kroger has not violated Section 2(f) of the Clayton Act, as alleged, and the complaint as to Kroger must be dismissed.

Initial Decision

XXII. *The Order*

For the reasons herein stated,

IT IS ORDERED that the complaint herein against Beatrice Foods Co., a corporation, and against The Kroger Co., Inc., a corporation, be, and the same hereby is, dismissed.

/s/ ABNER E. LIPSCOMB
Abner E. Lipscomb
Hearing Examiner

September 18, 1967

Complaint

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8663

In the Matter of

BEATRICE FOODS CO.,
a corporation, and

THE KROGER CO., INC.,
a corporation.

The Federal Trade Commission, having reason to believe that respondent Beatrice Foods Co., has violated and is now violating the provision of subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936 and that respondent The Kroger Co., Inc., has violated and is now violating subsection (f) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent Beatrice Foods Co., hereinafter referred to as "Beatrice," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 120 South LaSalle Street, Chicago, Illinois.

PARAGRAPH TWO: Respondent Beatrice is a holding and operating company having on February 28, 1963, a 100% voting power in approximately 15 subsidiary corporations. In addition to these corporations, Beatrice conducts a diversified dairy business including virtually all branches thereof through its operating divisions. Its principal operations are milk, creamery butter, ice cream, produce, cold storage and frozen foods. Beatrice's chief trade name is "Meadow Gold."

Respondent Beatrice has 134 plants for the manufacturing and processing of milk, butter, ice cream, ice cream mixes, dried buttermilk and powdered milk. These plants are located in 33 states. Sales branches are maintained by Beatrice at its manufacturing plants and, in addition, Beatrice has 242 selling branches in 42 states.

Beatrice's gross sales, less returns, for the fiscal year ending February 28, 1964, were $606,157,642.00.

PARAGRAPH THREE: Respondent The Kroger Co., Inc., hereinafter referred to as "Kroger," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 1014 Vine Street, Cincinnati, Ohio.

PARAGRAPH FOUR: Respondent Kroger is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. In the course and conduct of said business, Kroger maintains a highly integrated operation which includes the manufacturing, processing, distributing and retailing of a broad line of merchandise, including fluid milk and other dairy and food products and a variety of non-edible household products. On December

28, 1963, Kroger operated approximately 1,424 retail grocery stores in 24 states of the United States. Kroger's net sales amounted to $2,102,106,248 in 1963, $1,947,570,909 in 1962 and $1,842,342,667 in 1961.

Included among Kroger's retail grocery chain stores are approximately 44 stores located in portions of the states of West Virginia, Ohio and Kentucky comprising the Charleston Division of The Kroger Co., Inc., an operating division of the said respondent, Kroger.

PARAGRAPH FIVE: Respondent Beatrice sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout 42 states of the United States, including the states of West Virginia, Ohio and Kentucky for use, consumption or resale therein.

PARAGRAPH SIX: In the course and conduct of its business, respondent Beatrice is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Beatrice is now, and for many years past has been transporting fluid milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment, to purchasers located in other states of the United States.

Beatrice also sells and distributes its said fluid milk and other dairy products to purchasers located in the same

states and places where such products are processed, manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by Beatrice of its said fluid milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PARAGRAPH SEVEN: Respondent Beatrice sells its fluid milk and other dairy products to retailers and consumers. Beatrice's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Beatrice.

Respondent Beatrice, in the sale of its fluid milk and other dairy products to retailers and consumers, is in substantial competition with other manufacturers, distributors and sellers of such products.

PARAGRAPH EIGHT: In the course and conduct of its business in commerce, respondent Beatrice has discriminated and is now discriminating in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, beginning on or about June 4, 1962, Beatrice has discriminated in price in the sale of said products by charging many retailer-purchasers, who were and are in competition with the retail stores of Kroger's Charleston Division, higher prices than it charged Kroger's said retail stores. Such differences in price have ranged as high as 32 per cent for fluid milk in gallon containers.

PARAGRAPH NINE: The effect of such discriminations in price by respondent Beatrice in the sale of fluid milk and other dairy products has been or may be substantially to lessen competition or tend to create a monopoly in the purchasing, processing or sale of said products and to injure, destroy or prevent competition:

1. Between Beatrice and its competitors in the manufacture, processing, distribution and sale of such products.

2. Between retailers paying higher prices and competing retailers paying lower prices for Beatrice's said products.

PARAGRAPH TEN: The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PARAGRAPH ELEVEN: Paragraphs One through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: Respondent Kroger, in the course and conduct of its business, is now, and for many years has been purchasing in commerce from sellers engaged in commerce, as "commerce" is defined in the amended Clayton Act, numerous food and household products, including fluid milk and other dairy products, for use, consumption and resale within the United States.

In connection with such transactions, respondents are now, and have been, in active competition with other corporations, partnerships, firms and individuals also engaged

in the purchase for use, consumption and resale of such food and household products, including fluid milk and other dairy products, of like grade and quality from the same or competitive sellers. The aforesaid sellers are located in the various states of the United States, and respondent Kroger and such sellers cause the products when purchased by said respondent, to be transported from the place of manufacture, processing or purchase, to Kroger's warehouses and retail stores located in the same state or the various other states of the United States. Further, in many instances the aforesaid sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such food and household products, including fluid milk and other dairy products, are manufactured, processed or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply the said respondent.

PARAGRAPH THIRTEEN: Respondent Kroger is, and was at all times mentioned herein a knowledgeable processor, manufacturer and buyer of fluid milk and other dairy products. Kroger owns and operates at least three plants for the processing and manufacture of fluid milk, and other dairy products.

PARAGRAPH FOURTEEN: In the course and conduct of its business in commerce, Kroger has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

For example, respondent Kroger, in its negotiations with respondent Beatrice, before and after June 4, 1962, for the supply of fluid milk and other dairy products under private label to the stores of Kroger's Charleston Division, know-

ingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I of this complaint. Further, respondent Kroger had and has, since June 4, 1962, knowingly induced or received prices from respondent Beatrice in the purchase of such products for the stores of said Charleston Division which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I hereof.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by Kroger or peculiar to the retail operations of Kroger, its divisions and subsidiaries, instead of under labels displaying the brand names owned by Beatrice or peculiar to the operations of Beatrice.

PARAGRAPH FIFTEEN: When respondent Kroger knowingly induced or received the discriminatory prices from its supplier, as alleged, Kroger knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH SIXTEEN: The aforegoing acts and practices of Kroger are in violation of subsection (f) of Section 2 of the Clayton Act, a amended.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 30th day of July, A.D., 1965, issues its complaint against respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 5th day of October A.D. 1965 at

10 o'clock is hereby fixed as the time and Federal Trade Commission offices, 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint:

IT IS ORDERED that respondent Beatrice Foods Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of fluid milk or other dairy products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from, directly or indirectly, discriminating in price by selling fluid milk or other dairy products of like grade and quality to any purchaser at a net price higher than the net price granted to any other purchaser:

1. Where respondent, in the sale of said product, is in competition with any other seller.

2. Where any purchaser who pays the higher price does in fact compete in the resale of said products with the purchaser who receives the benefit of the lower price.

IT IS FURTHER ORDERED THAT respondent The Kroger Co., Inc., a corporation, and its officers, representatives, agents and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of fluid milk and other dairy

products, for resale in outlets operated by respondent, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts or other terms and conditions of sale by which net prices are effected.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 30th day of July, A.D., 1965.

By the Commission.

SEAL

/s/ JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

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Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~[illegible]~~ 70-202

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 1971

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"Appendix, Volume II, Transcript and Other Materials, Except Exhibits" (before Federal Trade Commission)	Cited 180-653 (no letter prefix)
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[1] A certified copy of the record in the court below—No. 20,233, United States Court of Appeals for the Sixth Circuit—is lodged in the office of the Clerk of this Court.

TABLE OF AUTHORITIES

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CASES:

American Motor Specialties Co. v. *FTC*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960) 18
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Balian Ice Cream Co. v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956) 16
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Columbus Coated Fabrics Corp., 55 F.T.C. 1500 (1959) 26

Dolan v. *Celebrezze*, 381 F.2d 231 (2d Cir. 1967) 26

Engineers & Fabricators, Inc. v. *NLRB*, 376 F.2d 482 (5th Cir. 1967) 23

FTC v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) 22
FTC v. *J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965) 24
FTC v. *Ruberoid Co.*, 343 U.S. 470 (1952) 20
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Forster Mfg. Co. v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965) 22

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Fred Meyer, Inc., 63 F.T.C. 1 (1963) 15, 18, 19, 20
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IBEW, Local 648 v. *NLRB*, —— F.2d ——, 76 LRRM 3051 (Nos. 20,623-24, 6th Cir., decided April 15, 1971) 24

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Federal Trade Commission Rules of Practice (16 C.F.R. §§3.41(d) and 3.54(a)) 5, 26

OTHER AUTHORITIES:

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Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963) 19

Rowe, *Price Discrimination Under the Robinson-Patman Act* 447 (1962) 19

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Kroger Co. ("Kroger"), prays a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming a 3-2 decision of the Federal Trade Commission (the "Commission").

INTRODUCTORY STATEMENT

The decision below is a first impression construction of the "buyer" provision—subsection 2(f)—of the Robinson-Patman Act (which amended Section 2 of the Clayton Act). That provision forbids a buyer "knowingly to induce or receive a discrimination in price . . . *prohibited* [to the seller] by this section."[1]

The case arose from a joint complaint and hearing charging Beatrice Foods Co. ("Beatrice"), as seller, with price discrimination prohibited by subsection 2(a) of the Act, and Kroger, as buyer, with violating subsection 2(f), with respect to the identical transactions (174-76; 180-81).[2]

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[1] Emphasis supplied throughout unless otherwise indicated.

[2] Record designations used in the petition are identified in the Index at pages iii and iv, *supra*.

The Hearing Examiner dismissed the charges against both Kroger and Beatrice. The Commission majority reversed as to Kroger alone, holding that it had violated 2(f), while simultaneously ruling that Beatrice had not granted Kroger any price discrimination *"prohibited"* by 2(a).

The Court of Appeals affirmed that holding—which Commissioner Elman, dissenting, had characterized as:

> "The novel and extraordinary legal theory on which the Commission now imposes 2(f) liability on Kroger" (D:98).

The decisions below conflict squarely with the text of 2(f) and with every previous decision applying it, including this Court's controlling precedents. The resulting issues are of vital importance to the consuming public and the American business community.

There is also fundamental conflict with the notice requirement of § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (Supp. V), concerning both "matters of fact and law asserted." As Commissioner Elman further noted, the "extraordinary legal theory" invoked against Kroger "was neither alleged in the complaint, issued July 30, 1965, nor urged by Commission counsel at any [timely] stage of these proceedings" (D:98).[3]

The critical issues involved cannot be masked in a "substantial evidence" guise. As will be shown, the opinions and the government's admissions below are themselves clear that the sole basis of the unauthorized and unprecedented ruling below was a second fundamental procedural error, in sanctioning government counsel's belated injection of a

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[3] At the outset of the hearings, it was expressly affirmed by Commission counsel (hereafter "government counsel"):

> "[T]his case joins Kroger and Beatrice in the same complaint, one lodged—one charged with 2(a) and the other one charged with a violation of 2(f). *And there can't be a violation of 2(f) without 2(a).*" (183).

wholly new issue on their appeal of the Initial Decision to the Commission. Its essence was the untimely impeachment, at that stage, of Mr. Francis X. Casserly, a former Kroger employee, who was a government witness and had been credited by the government throughout the prior proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 438 F.2d 1372, is appended hereto as Appendix A, pages CA:1-CA:15.[4] A "Separate Appendix" contains the opinions of the Commission, not yet officially reported, at pages FT:4-FT:89 (majority) and D:90-D:98 (concurring and dissenting), and the Initial Decision at pages ID:99-ID:169.

JURISDICTION

The judgment of the Court of Appeals, appended as Appendix B, pages CA:16-CA:17, was entered February 25, 1971. That court's jurisdiction was based on subsection 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c). Subsection 5(b) of that Act provided the Commission's jurisdiction. 15 U.S.C. § 45(b).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2 of the amended Clayton Act authorizes a determination that the buyer violated 2(f) by accepting a price which the seller lawfully granted?

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[4] "Appended" materials are incorporated in this petition following "Reasons for Granting the Writ," namely, Appendices A, B, C and D, and Addenda I and II.

2. Whether the standards applied for determining 2(f) liability conflict with controlling decisions of this Court?

3. Whether the Administrative Procedure Act and the Commission's Rules of Practice were violated because 2(f) liability was based on matters of fact and law first asserted when government counsel changed the theory of the case in appealing the Hearing Examiner's adverse decision to the Commission?

STATUTES INVOLVED

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §§ 13(a), (b) and (f)), and §§ 5(a) and 5(b)(2), (3) of the Administrative Procedure Act (5 U.S.C. §§ 554(a), 554(b)(2), (3) (Supp. V)). These statutes are appended as Appendix C, pages A:18-A:20.

In brief, 2(a) of the Clayton Act forbids discriminatory prices which threaten competitive injury, unless the "differentials" reflect cost differences "resulting from the differing methods or quantities" in which the goods are "sold or delivered"; 2(b) authorizes a seller "in good faith to meet an equally low price of a competitor"; 2(f) forbids a buyer "knowingly" to accept "a discrimination in price which is prohibited by this section."

Section 5 of the Administrative Procedure Act requires that respondents in an "agency hearing" receive timely notice of "the legal authority and jurisdiction under which the hearing is to be held" and of "the matters of fact and law asserted."

REGULATIONS INVOLVED

The regulations involved are the Federal Trade Commission's Rules of Practice (§§ 3.41(d), and 3.54(a), 16 C.F.R. §§ 3.41(d); 3.54(a)), appended as Appendix D, page A:21. They prescribe the Commission's procedure for impeaching a witness and its jurisdiction in reviewing an Initial Decision.

STATEMENT OF THE CASE

A. *Beatrice's Different Methods and Quantities in Selling Kroger, Compared With Other Customers*

1. The alleged discrimination involved Beatrice's sales, from June 1962 until October 1963, to 44 stores in Kroger's Charleston Division, consisting of West Virginia and small sections of Ohio and Kentucky (FT:5, 9). Beatrice used wholly different methods of sale and delivery to Kroger (FT:6; ID:114). The product was private-branded as "Kroger label milk" (FT:14; CA:5), with "responsibility for advertising . . . upon Kroger" (ID:112). Delivery was made by a "form of reduced service which would cut distribution costs" (CA:6)—namely, "a 'stripped service' basis whereby Kroger personnel performed all of the functions in the nature of in-store services that Beatrice' route salesmen otherwise performed" (FT:6).[5] For purposes of this arrangement, Beatrice further reduced its costs by amendment of its union contract to reduce routemen's commissions by 25%—*i.e.*, from 8% to 6% (506-07; X 29).[6]

[5] Additionally, under this "stripped" method, "simplified ordering and billing procedures can be used and the usual liberal return privilege modified" (FT:19). See ID:111-12.

[6] "X" designations are to the pages of the lower court Appendix, Volume III, containing the exhibits below. All such designations are to government exhibits unless coupled with the designation "RBX", which signifies a Beatrice exhibit.

2. Beatrice's other customers bought its "vendor branded" product (CA:4)—either "Meadow Gold" or "Greenbrier" (FT:8). They received the "'full service' method of milk distribution, requiring the routeman to deliver and also stock the dairy case" (CA:4) and "to devote time to matters of ordering, invoicing and billing" (FT:11).

3. Kroger purchased much greater product quantities per store than any other Beatrice customer. Before considering the arrangement, Beatrice's main interest was in "finding out . . . the volume of business of each Kroger store" (FT:17; CA:5). Its plant manager (G. C. Stollings), a government witness, testified that he received the figures at his first meeting with Casserly and that Kroger's per store volumes averaged 50% of Beatrice's "wholesale milk routes" (232).[7]

B. *Background of the Kroger-Beatrice Arrangement*

4. The background of the arrangement was Kroger's decision to buy such goods from one supplier (FT:70). Kroger had two principal reasons. First, because many of its stores had to carry numerous name brands, they were subjected to the "nuisance" of repeated daily calls by routemen (FT:11, 13). Second, the "absence of a division-wide brand" precluded "effective advertising" (FT:13).

5. The arrangement followed negotiations with several dairies, in which Kroger was represented by Mr. Francis

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[7] The court below incorrectly implied that Kroger's volume was the "result" of the arrangement and that Kroger's "Addendum I" disclosed "higher profits" (CA:14). Only store volumes, not profits, appeared in that Addendum (appended as Addendum I, page A:23).

X. Casserly, Manager of its Dayton, Ohio dairy plant (FT: 13). At that time, the dairies' "published price lists . . . applied only to those brand products that were delivered under the regular- or full-service agreements" (ID:114). Actual selling prices "were based on a list price *less a percent discount*" (FT:6; CA:4). Beatrice was aware of "'trade discounts in the area that were generally *ten* percent, some of them as high as *fifteen* percent.'" (FT:23).

C. *The Original Broughton Offer*

6. Casserly initially contacted four dairies already serving Kroger,[8] but not Beatrice, which was not believed to use the desired container (ID:115-16). Broughton Farm Dairy made the first proposal, as of January 6, 1962 (CA:5; FT:15), based on the December 1961 market (X 129-63). This proposal *did not mention list prices.* It was "in the form of tabulations covering each Kroger store location and showing the existing retail price out of each store, the *'prevailing wholesale price in the market',* the proposed price for Kroger label products and *a percentage figure for Kroger's gross profit.*" (FT:15-16; CA:5).[9]

7. As a government witness,[10] Casserly "testified that Broughton 'indicated discount off list price on this bid of up to 20 per cent'" (FT:16 n. 1). Government counsel neither challenged Casserly nor offered any testimony con-

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[8] Namely, Broughton Farm Dairy, Fairmont Foods Company, The Borden Company, and Valley Bell Dairy (CA:5; ID:113).

[9] The tabulations incorporated 572 prices for 16 items in 33 different communities (X 130-63).

[10] Casserly had previously severed his association with Kroger (248). The Commission Chairman expressly ruled that he was a government witness (577).

tradicting him.[11] Instead, government counsel credited Casserly, proposing that the Examiner find as follows (547):

> "121. *The First Offer Received Quoted a Price of List Price Less 20%.*
>
> "Early in January 1962, Broughton submitted its initial proposal to Kroger for pricing on private label milk and dairy products. (Casserly, Tr. 594). Broughton was already serving seven stores in Kroger's Columbus, Ohio Division with private label. (Casserly, Tr. 596). The bid which Broughton submitted in January was essentially the same offer that it was using in the Columbus Division, that was, a 20 percent discount off of list price. (Casserly, Tr. 596, 603)."

The Examiner found that Broughton "offered discounts approximating 20 percent from its list prices" (ID:118).[12]

8. On appeal to the Commission, government counsel changed position, claiming "*'Kroger Misled the Dairies Concerning Receipt of a 20% Discount Offer'*" (CA:11). This claim was a revised interpretation of the same Broughton offer underlying counsel's proposed finding to the Examiner. It was expressed by an improvised table

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[11] Government counsel did not call Mr. Robert N. Hurst, the Broughton official who submitted its proposal to Casserly (273, 370-71); although he had been scheduled as a government witness following Casserly's appearance (541, 542, 544, 338).

[12] Government counsel never disputed Casserly before the Examiner. In their reply to respondents' proposed findings, counsel described Casserly's testimony as follows (558):

> "This bid was characterized by Mr. Casserly as representing *an average discount of approximately 20%* . . . . In actuality, an examination of this Broughton proposal shows that it did not offer a *uniform* 20% discount".

Casserly had never testified that Broughton offered "a uniform 20% discount." According to the Commission, he had described it as "'an average 20 percent'" (FT:15); "'up to 20 percent'" (FT:16 n. 1); "'in the neighborhood of 20 per cent'" (FT:44).

of percentage discount figures, newly injected by counsel's Reply Brief to the Commission (FT:16), and never tested by submission as evidence. Citing only that brief, the Commission accepted those figures as fact, while acknowledging first, that they represented "*Complaint counsel's calculations* show[ing] an average discount on gallons for all Kroger locations *as stated by Broughton* of a little less than 11%" (*ibid.*; CA:5); and, second, that the "*figures shown by Broughton . . . are somewhat different*" (FT:16 n. 1).[13] On that basis, the Commission impeached Casserly, holding that his "testimony characteriz[ing] these prices as amounting to a discount of 'an average of 20 percent' * * * was not true" (FT:15).

9. The court below imposed 2(f) liability by adopting the Commission's finding that Kroger had given "'false price information' to Beatrice as to Broughton's competing bid" (CA:2; FT:47).

The opinion mistakenly asserted:

> "It is uncontested that prices in the bid averaged a discount of 10.9 per cent. (Appendix 646.)" (CA:5).[14]
>
> * * *
>
> "We find no denial of this fact in the appellant's briefs" (CA:10).

Kroger did contest and deny that purported fact.[15]

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[13] In adopting the reply brief "calculations," the Commission made no mention either of counsel's shift in position or of its own subsequent recognition that discounts of 10-15% were common on vendor brands (FT:23).

[14] "Appendix 646" refers to government counsel's reply brief on appeal to the Commission (646). The opinion below was inconsistent regarding this offer, first stating that Broughton's gallon quotations "rang[ed] from slightly over 73 cents to more than 81 cents" (CA:6), but later acknowledging quotations in the 65 to 68 cent range (CA:10).

[15] Kroger's briefs noted, *inter alia*, that government counsel's improvised table, underlying the "less than 11%" finding,

[*Footnote continued on next page*]

D. *Beatrice's Introduction of Formula Pricing*

10. Off-list proposals lost significance within a week of Broughton's original offer, when Beatrice, having "heard rumors that Kroger was seeking private label milk, contacted Casserly and arranged a meeting on January 12." (CA:5). As a result of that meeting, Beatrice's representatives "considered the possibility of exploring a formula method of pricing—one which would be geared to their cost of milk rather than a discount from list price" (FT:18), and would cover "manufacturing and distributing costs, plus profit" (ID:119).

11. On January 25, 1962, the Beatrice representatives learned to their "surprise" that formula pricing "was attractive to Mr. Casserly" (ID:120).[16] When advised that Kroger was receptive, all interested dairies quickly offered formula prices. By mid-March 1962, Kroger had received such offers from four dairies (FT:26-27 [Broughton], FT:28 [Fairmont], FT:29-30 [Borden], FT:30-32 [Beatrice]).

". . . was a bobtailed and misleading representation of the Broughton proposal, never put in evidence and never tested by interrogation through Mr. Casserly or anyone else." (*Reply Brief of The Kroger Co.*, No. 20,233, United States Court of Appeals for the Sixth Circuit, at 6.)

* * *

". . . the Broughton proposal did not speak of list prices and contained no reference to the percentage discounts shown in the abridged table introduced in Commission counsel's reply brief." *Id.* at 8.

[16] The opinion below mistakenly states that "larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk" (CA:5).

E. *The Dairies' Assurances That Their Proposals Were Lawful*

12. Kroger received clear assurances from three of the dairies, including Beatrice, that their proposals were lawful under the Robinson-Patman Act (FT:34-35; ID:125-26, 147). Beatrice's proposal was first made to Casserly "subject to review and approval by Beatrice's legal department" (ID:128). It was officially given to him, three weeks later, as a "revision . . . approved by Chicago counsel" (FT:35). Fairmont gave Casserly "memoranda of law . . . prepared by its attorneys discussing the question of cost justification" (FT:29). These analyzed in detail "various types of savings" in Fairmont's "expenses for advertising, billing, servicing, and delivering." (ID:121). "Because of these savings, Fairmont stated that its prices could be cost justified" (*ibid.*). Casserly was "advised that the prices in Borden's Plan No. 2 [stripped service] reflected savings attributable to the limited service involved" (ID:125).

F. *Beatrice Met Fairmont's Prices, Not Broughton's*

13. Contrary to the opinion below, Beatrice's objective was to meet Fairmont's prices, not Broughton's.[17] This was recognized by all concerned, including the government, the Examiner and the Commission. In appealing to the Commission, government counsel declared:[18]

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[17] The court simply misread the record in twice asserting that Beatrice's endeavor was to meet "Broughton's equally low price." (CA:2, 9). This misconception was the ground of its decision that Beatrice's "successful defense under § 2(b) cannot exculpate the buyer" (CA:9).

[18] Volume I, *Appeal Brief of Counsel Supporting the Complaint* at 66.

> "[Beatrice] knew that its only serious contender was Fairmont as early as January 25, 1965. (Tr. 384-85, 492). If then determinedly proceeded to offer lower and lower prices until it got below Fairmont's proposal. (Tr. 412-13, 495-97)."

The Examiner found that Beatrice's purpose was "to meet a competitive bid of Fairmont Foods Company" (ID:154). The Commission found that Beatrice had quickly ascertained that its "primary competition was not Broughton but Fairmont" (FT:21)[19] and thereafter its object was "to try and meet [Fairmont's] offer." (FT:29 n. 1).

14. Beatrice initiated its formula proposal to Casserly on March 14, 1962. "[K]nowing it probably wasn't quite as good as Fairmont" (220), Beatrice—through Stollings—first quoted 68¢ on gallon jugs (CA:7). Casserly replied "'that he had received a bid *from Fairmont* that was better than this'" (*ibid.*). Stollings "talked with Casserly about the 66 cent price, and Casserly replied that 'now you are getting—you are in a position of being competitive with some of the other people.'" (CA:7-8). At this point, Casserly and Stollings "'worked out a formula'" (CA:7).[20]

15. Beatrice's March 14 proposal "was not considered to be final by either party" (FT:34). Casserly stated only

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[19] Casserly had so informed Beatrice. Speaking of a meeting with Casserly on January 25, 1962, Beatrice's District Manager, Hugh Hutchinson, so testified as a government witness (204):

> "Q. Did you get that impression from talking to Casserly that Fairmont was now your main contender?
> "A. He told us."

[20] The record refutes the court's later recital that "Casserly himself built up the cost formula" (CA:12). Stollings described the joint process and testified: "The price was a result of my saying we will sell you milk for 66 cents." (240).

that it was " 'competitive' ", while Beatrice advised that it "would have to be submitted to the company's Chicago office for review by counsel". (*Ibid.*)

16. Believing that the Fairmont and Beatrice offers "were the most desirable," but finding them "difficult to compare," Casserly "turned [them] over to his accountant for a comparative evaluation" (ID:129). The accountant reported that "it was impossible on the basis of price of fluid milk to distinguish between them",[21] noting a "difference" only on cottage cheese, an item of "comparative insignificance" (FT:42). Casserly felt Beatrice's "constant price" on that item was "more favorable than Fairmont's fluctuating price" (FT:42; ID:129). In fact, "Kroger's cost for cottage cheese . . . would have been lower under the Fairmont price" (FT:42 n. 2).

17. On April 9, 1962, Stollings handed Casserly a "revision of the Beatrice proposal dated April 5, 1962, which had been approved by [Beatrice's] Chicago counsel" (FT:35). Deliveries began in June 1962, following Casserly's rejection of Fairmont's offer "to reduce its quotations upon satisfactory proof that such reduction was necessary to meet a pricing schedule proposed by a competing supplier" (FT:36).

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[21] For the five relevant West Virginia areas (FT:9, 16), the Fairmont and Beatrice formula proposals quoted the following milk prices per gallon jug (FT:28, 35):

Area	*Fairmont*	*Beatrice*
Beckley	$.6526	$.66
Charleston	$.6526	$.66
Clarksburg	$.7255	$.66
Lewisburg	$.6526	$.66
Logan	$.6533	$.66

G. *The General Offer of Equivalent Prices on Formula, Limited Service Terms*

18. The much lower price structure feasible for the dairies, under formula and limited service terms, was demonstrated in February 1963 (FT:64)—midway in the alleged discrimination period (FT:5). At that time, "[r]esponding to competitive moves by other dairies" (FT:53),

> "Beatrice instituted a new program of 'tailgate' service throughout the area covered by its Beckley plant *which resulted in sharply reduced prices for all purchasers under the normal discount system.*" (FT:87).[22]

Like Kroger's private label prices, Beatrice's "tailgate" prices were tied to raw milk costs[23] and were offered "in exchange for the performance of certain in-store services by its customers" (FT:54).

19. As a result, "the differentials between Kroger's private brand products and Beatrice brand products were significantly reduced." (FT:64).[24] In February 1963, Kroger's gallon price was 65.6¢ (FT:48), compared with a tailgate price of "68 cents per gallon" (FT:54).

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[22] The Beckley plant covered the "Charleston and Beckley areas" (FT:64), and served all but 5 of Kroger's 44 stores (ID:135).

[23] As was true of Kroger's formula prices (FT:35-36), the "tailgate" prices were "based on the Class I price, Federal Market Order No. 5, Huntington, West Virginia" and were to "fluctuate with Federal Market Order price changes each month" (RBX 123C at X 280).

[24] "Within a matter of days", moreover, tailgate customers were favored with "full in-store services, but at the reduced price level" (FT:54), upon demand of "independent grocers" (504).

H. *Beatrice's Cost Study*

20. In defending the 2(a) charges, Beatrice introduced a cost-justification study (FT:74-76), which was rejected as "not of sufficient reliability" (ID:166; FT:79). The Examiner excluded it from the case against Kroger since it "came entirely from the records of Beatrice, none of which were shown to . . . [Kroger] at the time of the negotiations" (ID:155).[25] Having dismissed Beatrice under 2(b), the Commission considered "cost justification" only as to Kroger, holding that "to some extent the validity" of Beatrice's study was relevant to the 2(f) charges (FT:71-72).

I. *The Decisions Below*

21. The Examiner and the Commission both dismissed the 2(a) charges against Beatrice under the 2(b) "meeting competition" defense (ID:168; FT:88). In dismissing Kroger, the Examiner followed *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953), quoting, *inter alia* (ID:147-48), its holding that ". . . § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers . . . set out in the provisos of §§ 2(a) *and 2(b).*" 346 U.S. at 71.

He further held that because there was no "probative evidence that Kroger had any reasonable basis to believe

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[25] This ruling is the apparent basis of the court's reference to "Kroger's strategy" in emphasizing that "its responsibility could not be judged by the acts of Beatrice." (CA:11). However, this "strategy" and the Examiner's ruling reflected the following 2(f) principle enunciated by the Commission in *Fred Meyer, Inc.*, 63 F.T.C. 1, 67 (1963):

> "A valid cost study showing that the concessions *were* cost justified would defeat complaint counsel's case, but the converse is not true: such a study, if it showed that the concessions were *not* cost justified, would not prove that respondents 'knew' that fact." (Emphasis in original.)

that the prices offered it by Beatrice were not, in fact, cost-justified", the 2(f) charges were unsupportable "regardless of the decision" as to Beatrice (ID:149).

22. While affirming as to Beatrice, the Commission reversed as to Kroger, ruling that it "bargained too hard" when Casserly "falsely" represented "the original Broughton offer" and "*failed* to convey any *correct* information about the price levels being quoted by others." (FT:80-81; emphasis in original). The Commission held *Automatic Canteen* did not mean that a seller's 2(b) defense protected a buyer receiving "a second discriminatory offer which meets an offer *previously induced by the buyer*" (FT:82; emphasis in original).[26] It so held despite its disavowal of any ruling that Fairmont's proposal was unlawful (FT:29 n. 1).[27]

The Commission imputed "2(f)" knowledge to Kroger because it was not advised "that specific differentials . . . were cost justified." (FT:84-85).

Commissioner Jones alone favored the decision against Kroger and the dismissal of Beatrice. (CA:3-4).

23. Commissioner Elman's dissent pointed out (D:96-97):

> ". . . the Commission does not find, because the record would not justify such a finding, that (1) the price offers made to Kroger by Beatrice's competitors were unlawful under Section 2(a), and (2) either Beatrice

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[26] The only authority cited by the Commission was a case brought under § 5 of the Federal Trade Commission Act, in which Commissioner Elman—who dissented here—wrote the opinion. *Max Factor & Co.*, 66 F.T.C. 184, 249, 251 n. 4 (1964).

[27] The Commission never discussed the legality of any other proposal to Kroger. In any event, it is questionable whether the legality of the price being met is material. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956); Chairman Dixon's separate opinion at D:92.

> or Kroger had any reason to believe that the price offers made by the other sellers were unlawful. We are confronted, then, with a Commission decision holding Kroger guilty under Section 2(f) of 'knowingly' inducing or receiving 'a discrimination in price which is prohibited by this section', on a record which fails to show any price discrimination illegal under Section 2."

24. The Court of Appeals nevertheless affirmed the Commission. Rejecting the contention that "there cannot be a violation of section 2(f) without there being one under section 2(a)", it held (CA:2):

> "While ordinarily this may be true . . . it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given 'false price information' to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price."

REASONS FOR GRANTING THE WRIT

1. The Decision Below Departs From the Uniform Rule That There Can Be No 2(f) Violation Absent a 2(a) Violation.

Subsection 2(f) of Section 2 of the amended Clayton Act applies only to a buyer "knowingly" favored by a price discrimination "prohibited by this *section*." The "section" includes subsection 2(b), under which the Commission dismissed the 2(a) charges against Beatrice.[28] Dismissal of

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[28] This Court has conclusively held that 2(b) "afforded a seller a complete defense to a charge of price discrimination." ***FTC*** v. *Standard Oil Co.*, 355 U.S. 396, 397 (1958).

the 2(f) complaint against Kroger was accordingly required because there was no "prohibited" discrimination. As Commissioner Elman perceived, the result below produces the paradox of

> ". . . a Commission decision holding Kroger guilty under Section 2(f) . . . on a record which fails to show any price discrimination illegal under Section 2." (D:96-97).[29]

This result conflicts with all prior authorities, including *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 71, 74 (1953) and *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 n. 6 (1959).[30]

In *Automatic Canteen, supra*—involving prices the buyer "knew were as much as 33% lower" (346 U.S. at 62)[31]—the Court held (*id.* at 71, 74):

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[29] Four of the Commissioners favored a result harmonizing 2(a) and 2(f)—two of the majority who would have held Beatrice liable and the two who dissented from the ruling against Kroger. See the opinion below at CA:3-4.

[30] *Texas Gulf Sulphur Co.* v. *J. R. Simplot Co.*, 418 F.2d 793, 803-05 (9th Cir. 1969); *Mid-South Distributors* v. *FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *American Motor Specialties Co.* v. *FTC*, 278 F.2d 225, 229 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *Fred Meyer, Inc.*, 63 F.T.C. 1, 51 (1963); *Bird & Son, Inc.*, 25 F.T.C. 548, 553 (1937); *Sears, Roebuck & Co.*, 66 F.T.C. 371, 376, 378 (1964).

[31] These differentials were ignored in the citation below of differentials in other cases (CA:14 n. 4), only one of which involved 2(f). *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). That case concerned an "annual promotion", during which lower prices were granted a buyer who "pays the going price during the other eleven months of the year." *Id.* at 355, 364.

According to a "chart, page 34, Commission's brief" (CA:14)—appended at p. A:24—the differentials urged here as proof of illegal discrimination against full service-brand customers, ranged from 10.22% to 17.51%—except for 28.01% in the case of "City Market, a very small customer in Rainelle, West Virginia" (FT:49). Unlawful discrimination is not established by "any discrepancy in price between any two purchasers," even if not cost justified. *United States* v. *Borden Co.*, 370 U.S. 460, 468 (1962).

". . . § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within *one* or more of the 'defenses' available to sellers, such as . . . cost differences . . . *or bona fide attempts to meet competition,* as those defenses are set out in the provisos of §§ 2(a) and 2(b)."

• • •

"We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within *one* of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." [32]

In *Simplicity Pattern, supra,* the Court similarly declared that 2(f) liability is derivative (380 U.S. at 65 n. 6):

"Subsection (f) is a corollary to § 2(a), making it unlawful 'knowingly to induce or receive' a price discrimination *barred* by the latter."

Until this case, the Commission's position was identical. It had held in *Fred Meyer, supra,* 63 F.T.C. at 51:

"Under Section 2(f) the buyer is exonerated unless it is shown that he either knew or should have known not only that he has received a discriminatory price, but also that the discrimination cannot be justified under *any* of the available defenses." [33]

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[32] In a tortured effort to escape this holding, the court below italicized the last clause (beginning "or not known"), despite the preceding clause absolving a buyer "if the lower prices he induces are . . . within *one* of the seller's defenses" (CA 8).

[33] The Act's co-author and its leading commentator agree that under 2(f), the Commission "must also show that the discrimination was not justified under *any* of the defensive provisos in Subsections 2(a) and 2(b)." Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963); Rowe, *Price Discrimination Under the Robinson-Patman Act* 447 (1962).

The fatal defect of the decision below is that it judicially amends subsection 2(f) to comprehend price differentials which are not *"prohibited"* by Section 2. Because such amendment is intolerable, *Simplicity Pattern, supra,* reinstated a Commission decision that 2(b) does not allow cost justification or lack of competitive injury as defenses to a seller charged with granting non-proportional services and facilities in violation of subsection 2(e). Noting that those defenses "by their terms apply to price discriminations" (360 U.S. at 66-67), the Court held (*id.* at 67):

> "On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso. *We cannot supply what Congress has studiously omitted.*"[34]

What is sauce for the Commission must be sauce for the private litigant, especially where the Commission *sub silentio* reverses its own prior doctrine. See *Fred Meyer,* p. 19, *supra.*[35]

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[34] See also *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 478-79 (1952).

[35] The Commission also flouted *Automatic Canteen* in charging Kroger with knowledge that Beatrice's prices were unlawful because it "did not receive any information . . . that specific differentials . . . were cost justified." (FT 84-85). But *Automatic Canteen* teaches that Kroger's "[i]nsistence on [such] proof of costs" was precluded by "other antitrust policies." 346 U.S. at 69. Having been assured that Beatrice's counsel had approved the legality of its offer (pp. 11, 13, *supra*), Kroger could require no more.

The differences in "methods or quantities" in this case foreclose the conclusion that "the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference." *Automatic Canteen, supra,* 346 U.S. at 80. The method and quantity differences here far surpassed those which dictated dismissal of *Automatic Canteen* on remand from this Court. *Automatic Canteen Co.,* 51 F.T.C. 574, 576-77 (1955).

2. The Statutory Specification of Derivative Buyer Liability Does Not Allow the Exception Which the Lower Court Devised on the Hypothesis That the Buyer "Was Found by the Commission to Have Given 'False Price Information'" (CA:2).

(a) *The Robinson-Patman Authorities Foreclose Such an Exception.*

Assuming *arguendo* that Casserly misstated Broughton's offer, the authorities repel the notion that 2(f) requires a buyer to provide "*correct* information about the price levels being quoted by others." (FT:81; emphasis in original). For good reason all prior decisions sustain Commissioner Elman's analysis (D:97):

> "No one has heretofore conceived of the Robinson-Patman Act as imposing a duty of affirmative disclosure on buyers engaged in price negotiations with sellers, requiring them to convey 'correct information' on the prices quoted by other competing sellers."

This accurately reflects *Automatic Canteen's* mandate against reading 2(f) to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63). It heeds *Automatic Canteen's* warning against "putting the buyer at his peril whenever he engages in price bargaining" because of the resultant threat to "sturdy bargaining between buyer and seller" (346 U.S. at 73-74).[36]

"Sturdy bargaining" cannot proceed under the "correct information" requirement. The first offer a buyer received would then set the floor for all sellers, since 2(b) in terms applies only to a price offered "to meet an *equally* low price of a competitor."[37] That would resurrect the "'meet but not beat' criterion" which the Commission held would improperly "outlaw such bidding situations" by injecting an

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[36] See also *FTC v. Standard Oil Co.*, 355 U.S. 396, 403 (1958).

[37] Kintner, *A Robinson-Patman Primer* 185 (1970).

"artificial and rigid test" (FT:70-71).[38] Nor would a buyer's silence, if permissible, comport with *Automatic Canteen's* endorsement of "sturdy bargaining." That would mean the buyer's renunciation of any bargaining.

As the First Circuit perceived, the "correct information" concept, however appealing in theory, is commercially "naive." *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 55-56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). It there held:

> "[The Commission] ruled that to establish the § 2(b) defense the seller must have proof positive before its cut in price of the amount of competitive offers and the names of the bidders who made them. . . .
>
> "We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic."

This is simply common sense. Suppliers are not so gullible as to accept without question whatever a buyer may represent as to competing offers.

There is no *ad hoc* need to ignore the legislative limits of 2(f) in order to deal with buyers who allegedly misstate the quotations they receive—assuming, *arguendo*, that it is unlawful to do so. Commissioner Elman's opinion for the Commission in *Max Factor & Co.*, 66 F.T.C. 184, 251 n. 4

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[38] It thereby applied the established rule—recognized since *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 758-60 (1945)—that 2(b) protects a seller who beats a competitor's price believing that it is a " 'competitive necessity'." (FT:71 n. 1).

(1964), points to the availability, for that purpose, of Section 5 of the Federal Trade Commission Act.[39]

(b) *No Such Exception Was Permissible Here Because the Determination That Casserly Misrepresented Broughton's Offer Was Foreclosed by the Administrative Procedure Act and the Commission's Rules of Practice.*

The holding that Casserly misstated Broughton's offer was not only unwarranted (see pp. 7-9, *supra*), but was impermissible under the Administrative Procedure Act. That Act guaranteed Kroger "timely" notice of "matters of fact and law asserted." (5 U.S.C. § 554(b)(3) (Supp. V)). The controlling principle in applying the Act is that "agency action must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, —— U.S. ——, 91 S. Ct. 814, 822 (1971).

The authorities applying that principle repel a "change in theory at the Commission level". *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968). They teach that "the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in [a] 'post-complaint theory of the case' unveiled in a post-hearing brief." *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966).[40]

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[39] The decision below cannot now be sustained by invoking Section 5, since the complaint referred neither to that statute nor to any alleged misrepresentation. The Administrative Procedure Act requires "timely" notice of "the legal authority and jurisdiction under which the hearing is to be held" and "of the matters of fact and law asserted." 5 U.S.C. §§ 554(b)(2), (3) (Supp. V). As Commissioner Elman noted, "this was a conventional 2(f) case, proceeding on the familiar *Automatic Canteen* theory" (D:98).

[40] *Accord: NLRB* v. *H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962); *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F.2d 482, 485 (5th Cir. 1967); *Boyle's Famous Corned Beef Co.* v. *NLRB*, 400 F.2d 154, 164-65 (8th Cir. 1968).

Under the foregoing authorities, the following dispositive circumstances dictate reversal:

(i) the 2(f) complaint was addressed only to discriminations "*prohibited* by subsection (a) of Section 2" (175, 176);

(ii) the government's trial theory was that "*there can't be a violation of 2(f) without 2(a).*" (p. 2 n. 3, *supra*); independent 2(f) liability was never suggested to the Examiner;

(iii) the government throughout credited Casserly before the Examiner (pp. 7-8, *supra*);

(iv) the government's impeachment of Casserly in appealing the Initial Decision was the sole basis of the critical finding of misrepresentation, underlying the unprecedented imposition of independent 2(f) liability (FT: 15-16, 81-82; CA:2, 11).

In sum, this case was a classic violation of the rule commanded not only by the Administrative Procedure Act, but by due process requirements, that "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Rodale Press, Inc., supra,* 407 F.2d at 1256. "That is more than an irregularity in practice; it is a vital defect." Chief Justice Hughes in *Morgan* v. *United States,* 304 U.S. 1, 22 (1938).[41]

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[41] It was unnecessary to "change theories in midstream" (*Rodale Press, Inc., supra,* 407 F.2d at 1256), in order to allow resolution in this proceeding of the belatedly raised factual and legal issues. There was a practical alternative. "When the new issue was raised after the hearing," government counsel should have assumed "the burden of seeking a reopening." *Majestic Weaving Co., supra,* 355 F.2d at 862. Government counsel did so in *IBEW, Local 648* v. *NLRB,* —— F.2d ——, ——, 76 LRRM 3051, 3052 (Nos. 20,623-24, 6th Cir., decided April 15, 1971). Or the Commission could have remanded the case to the Examiner *sua sponte,* as it has often done where the record before it is inadequate for decision. *E.g., FTC* v. *J. Weingarten, Inc.,* 336 F.2d 687, 692 and n. 14 (5th Cir. 1964), *cert. denied,* 380 U.S. 908 (1965); *The Procter & Gamble Co.,* 58 F.T.C. 1203, 1206-07 (1961).

The Court of Appeals' efforts to validate the unlawful agency action are misconceived. Concerning the complaint's failure to allege independent 2(f) liability, the court's answer was that it "clearly charges Kroger in the exact terms of the Act which, of course, is sufficient." (CA:11). This makes a virtue of the complaint's vice—the lack of notice to Kroger of potential 2(f) liability absent "prohibited" discrimination. Concerning the "objection that the case was tried on a different theory before the Commission" (CA:11), the court answered that the

> ". . . release of Kroger . . . because of the acquittal of Beatrice was, of course, attacked before the Commission and caused more attention to be focused on Casserly's testimony. But counsel for the Commission maintained to the Examiner that Casserly had misrepresented the Broughton bid." (CA:11).

This absolution misconceives counsel's conduct (p. 8 n. 12, *supra*) and misapprehends the law.[42] It is also rebutted by the agency opinions. The meticulous Initial Decision is silent concerning any legal issue of Kroger's possible liability if Beatrice were exonerated, and also regarding any factual issue of Casserly's credibility, "as to which the weight to be given . . . a finding by a hearing officer attains its maximum." *Majestic Weaving Co., supra,* 355

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[42] The assertion that the Examiner knew of the misrepresentation claim is based on a prior statement that in its post-hearing "reply findings," the government so "told" him (CA:10). Assuming that was the fact, it was too late when "the point was first raised." *Majestic Weaving Co., supra,* 355 F.2d at 861. Actually, it was never raised before the Examiner. The "reply findings" were the passage stating that Broughton "did not offer a uniform 20% discount." (*Brief for Respondent*, No. 20,233, 6th Cir., 48.) This accorded with Casserly's testimony. See p. 8 n. 12, *supra*. The government first claimed that "Kroger Misled the Dairies" in its appeal brief to the Commission (CA:11).

F.2d at 859.[43] The Commission's opinion points in the same direction. Although the dissent challenged the untimely injection of "the novel and extraordinary legal theory" invoked against Kroger, citing *Rodale Press*, p. 23, *supra* (D: 98), the majority nowhere intimates the presentation of that theory to the Examiner.[44]

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[43] Following *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496-97 (1951); see also, *e.g.*, *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 409 (1962); *Dolan* v. *Celebrezze*, 381 F.2d 231, 233 (2d Cir. 1967). On every finding with which it disagreed, the Commission was as heedless of the Initial Decision as it was in *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 587-89 (D.C. Cir. 1970).

[44] In finding that Casserly's "testimony * * * was not true" (FT:15), the Commission violated its impeachment rule (3.41(d), p. A:21, *infra*), which follows the common law (*Columbus Coated Fabrics Corp.*, 55 F.T.C. 1500, 1527 (1959)), and thus contemplates a timely showing that the witness is adverse or hostile. *Rossano* v. *Blue Plate Foods, Inc.*, 314 F.2d 174, 178-79 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963). There was no such showing and Casserly, a government witness no longer in Kroger's employ, was not "adverse" by definition (see p. 7 n. 10, *supra*). The Commission is, of course, bound by its own rules. *E.g.*, *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Cinderella Career and Finishing Schools, supra*, 425 F.2d at 588-89.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1971

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20233

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Decided and Filed February 25, 1971.

Before TOM C. CLARK, Associate Justice,* and WADE H. McCREE, JR., and WILLIAM E. MILLER, Circuit Judges.

CLARK, Associate Justice:

The Kroger Company brings this petition for review in which it complains of a cease and desist order of the Federal Trade Commission holding Kroger in violation of section 2(f) of the Clayton Act, 15 U.S.C. Sec. 13(f)[1] for

* Associate Justice, Supreme Court of the United States, retired, sitting by designation.

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

having knowingly induced and received from Beatrice Food Company discriminatory prices on fluid milk and cottage cheese as prohibited by section 2(a) of the Act, 15 U.S.C. Sec. 13(a).[2] In the same order the Commission absolved Beatrice from responsibility under section 2(a) of the Act on the ground that its lower price was offered in good faith to meet an equally low price of a competitor, a defense authorized under section 2(b) of the Act, 15 U.S.C. Sec. 13(b).[3] Kroger seizes upon this circumstance contending that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price. Nor do we find substance to the other points raised—all of which we will discuss in more detail—and,

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[2] "It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

[3] "Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . *was made in good faith to meet an equally low price of a competitor* . . . ."

therefore, affirm the order of the Commission and direct its enforcement. The portions of the order having to do with Beatrice and other parties who were before the Commission and included in its order are not before us and therefore we express no opinion concerning them.

1. The course of the proceeding.

The administrative proceeding began on July 30, 1965, with the filing of a complaint charging Beatrice with discriminating in prices in the sale of fluid milk and other dairy products to the Kroger Company, and other parties, not involved here, in violation of section 2(a) of the Act, as amended. Kroger was charged with knowingly inducing or receiving prices for fluid milk under its own and other private label brands, cottage cheese and other dairy products in its transactions with Beatrice which were discriminatory under section 2(f) of the Act.

It was over two years later that the Hearing Examiner dismissed the complaint because (1) the prosecution under section 2(a) against Beatrice failed since the discrimination charged did not have the effect condemned by section 2(a); (2) the charge against Kroger under section 2(f) must be dismissed because of the failure of the Beatrice prosecution under section 2(a); and (3) as further grounds, that Beatrice had established a good faith meeting of competition defense under section 2(b) and, as to Kroger, that there was no evidence that Kroger knew or had reason to believe that the prices Beatrice offered were not in fact cost justified or were not offered in good faith to meet an equally low price of a competitor.

On appeal to the Commission the dismissal of the complaint by the Hearing Examiner was set aside as to Kroger

and a cease and desist order was entered against it based upon a violation of section 2(f); Chairman Dixon with Commissioners Jones and MacIntyre made up the majority, and Commissioners Elman and Nicholson dissented. The charge against Beatrice was dismissed on its section 2(b) defense and no review was sought; the majority consisted of Commissioners Jones, Elman and Nicholson with Chairman Dixon and Commissioner MacIntyre dissenting. It is significant to note that none of the dissenters took issue with the Commission's finding concerning the initial bid that the Broughton dairy made to Kroger which led to the resulting discriminatory pricing by Beatrice.

2. The background of the parties.

In 1963 Kroger operated a chain of over 1400 retail grocery stores located in some 19 states and which sold a variety of products. Its national volume of sales ran over $2 billion a year, including its milk and other dairy products. Kroger's competition in its Charleston Division included national chains such as A & P as well as regional chains and independent supermarkets.

Beatrice is the third largest dairy company in the United States, with $569 million annual sales in 1963. In 1962 Beatrice was one of several dairies serving the various areas within Kroger's Charleston Division. Prior to 1962, all dairy products in this area were vendor branded, and the supermarkets generally carried two or more brands in their dairy cases. Most customers generally received the "full service" method of milk distribution, requiring the routeman to deliver and also stock the dairy case. Prices were generally based on wholesale list prices with discounts to large purchasers. This price structure began to erode

in 1962 when larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk, and then by private branding of dairy products.

3. The circumstances surrounding the bidding.

In the fall of 1961, Kroger decided to explore private label sales in the hope that its own label might permit it to compete more profitably and effectively. Mr. Francis Casserly, manager of Kroger's Columbus Division, which was then operating a private label milk program, was designated to negotiate with dairies in the Charleston area. Casserly invited several companies, including Valley Bell, Broughton, Borden and Fairmont, to submit bids for bottling Kroger label milk for the Charleston Division.

The first bid received was from Broughton on January 6, 1962. It was in the form of tabulations covering each Kroger store location, showing the existing retail price, the prevailing wholesale price in the market, and a percentage figure for Kroger's gross profit. The Hearing Examiner found that Broughton offered discounts approximating 20 per cent from its list prices. The Commission found that the average discount amounted to "a little less than 11 per cent." It is uncontested that prices in the bid averaged a discount of 10.9 per cent. (Appendix 646.)

In January, 1962, Beatrice officials, who had heard rumors that Kroger was seeking private label milk, contacted Casserly and arranged a meeting on January 12. At that meeting the volume of business and area to be served were discussed. The Beatrice representatives were asked if they had an offer to make, and they said they were thinking in terms of a 15 per cent discount. Casserly replied,

"Well, forget it, I have already got one at 20" off the "existing list price." (Appendix 197) It stands undenied in the record that a 20 per cent discount was unheard of in the market area at that time. On January 25th Beatrice quoted 21 cents a pound on cottage cheese and Casserly "just told us right quick we weren't in the ballpark." (Appendix 234)

By letter of January 18, 1962, Casserly had informed the dairy companies that the bidding would be for a sales volume of dairy products in excess of $2 million annually. He indicated that Kroger was interested in some form of reduced service which would cut distribution costs, and requested bid prices based upon the cost of milk rather than discounts from the prevailing price structure.

Beatrice presented its first proposal to Kroger at a meeting with Casserly on February 9, 1962. The proposal included a price of 71 cents for a gallon of homogenized milk, arrived at by applying a discount of 16 to 18 percent for volume to the average price of 85 cents. Casserly told Beatrice representatives that they "might as well go back home" if that was all that they had to offer. (Appendix 207)

Casserly had not received any quotations lower than the Beatrice 71 cents per gallon bid at this time. The gallon jug was "the big item. That was the thing that really controlled this whole situation" (Appendix 206) and as the Hearing Examiner indicated, "the award of the contract might hinge on the gallon-jug price—since the 'gallon-jug was the big volume item.'" (Appendix ID-126) The first Broughton proposal contained prices per gallon ranging from slightly over 73 cents to more than 81 cents per gallon. Beatrice Division manager Stollings testified that Casserly nonetheless "told us of the 20 percent Broughton

price and he said, you don't have to be a very good mathematician to take an 85-cent average jug price and 20 per cent will show you that 71 cents is high." (Appendix 237) The discussion was promptly terminated. The Commission found that Casserly's rejection was not based on "any true appraisal" of the earlier Broughton offer, but that he simply thought he could get a better price. (Appendix O-25)

Other companies submitted bids. Broughton submitted a second proposal in February for $.7224 for a gallon of milk, and in March proposed prices ranging from $.6586 to $.6879. Fairmont's first proposal quoted prices ranging from $.6585 to $.8168, and later in February quoted prices ranging from $.6526 to $.7255. Borden submitted an offer, which varied according to the service and type of delivery.

On March 14, Beatrice representatives again met with Casserly and "quoted a 66 cents price." As Stollings reported it: "We talked about some of the other pricing. That is on a gallon jug . . . We talked about one or two other prices . . . We sat down across . . . the desk from Mr. Casserly and talked about a method of tying this price. That 66 cent price—I first talked about a 68 which was a 20 per cent discount, the Broughton discount from the 85 cent jug. At the time we were talking about this . . . Casserly said that he had received a bid from Fairmont that was better than this, and also mentioned that prices were 'collapsing' in the Charleston market (Appendix 239) . . . we worked out—me on one side and Mr. Casserly on the other—the mechanics—he did the mechanics. He had a calculator over there . . . and between the two of us we worked out a formula." (Appendix 240) Stollings further testified that he talked with Casserly about the 66 cent price, and Casserly replied that "now you are getting—you are in a

position of being competitive with some of the other people." (Appendix 239)

Beatrice's representatives made it clear that the 66 cent price would have to be approved by the Chicago office. In early April Stollings reviewed the proposal with Beatrice's house counsel and an accounting specialist. On April 9, 1962, Stollings met with Casserly and delivered a revision of the Beatrice proposal which had been approved by the home office. Prices were based on 66 cents per gallon of milk, and 17.5 cents per pound of cottage cheese. Kroger accepted the proposal and the companies began to operate under it in June, 1962.

4. The Section 2(f) violation.

Kroger claims that it cannot be found in violation of the discrimination clause of section 2(f) because Beatrice was absolved from its violation of the anti-discrimination provision of section 2(a) on its defense under section 2(b). It relies on a sentence in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), "that a buyer is not liable under Sec. 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification *or not known by him not to be within one of those defenses*" at 74, Emphasis being added. But this was just another way of saying, as the Court did earlier in the opinion, that section 2(f) was "roughly the counterpart, as to buyers, of sections of the Act dealing with discriminations by sellers." At p. 63. That is to say, a buyer may not be prosecuted for inducing discriminatory prices which it knows a seller may offer with impunity under section 2(b). As the Court itself put it:

"the discriminatory price that buyers are forbidden by Sec. 2(f) to induce . . . cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of Secs. 2(a) and 2(b)." At 70-71.

At first blush it might appear that Kroger's claim might have some merit, i.e. that a defense absolving its seller under section 2(b) operated *ipso facto* for its own acquittal. However, even granting the validity of such a deduction it would not be available here. *American Canteen* only holds that buyers may avail themselves of discriminatory prices that a seller may lawfully grant or those that are "not known by him [the buyer] not to be within one of these defenses." Id. The Commission found that Beatrice made a bona fide attempt to meet the Broughton bid which it was told by Kroger was the lower one. In so doing Beatrice was in good faith acting within a defense offered by section 2(b). On the other hand, Kroger knew that the Broughton bid was not lower and that the one of Beatrice was, therefore, not in fact responsive to an actual lower bid. In such a factual situation the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. See *Kintner, A Robinson-Patman Primer* 261. 315-331. In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced

must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act and frustrate the intent of the Congress.

The findings of the Commission with regard to the misrepresentation of the Broughton bid are fully supported by substantial evidence throughout the record. Casserly himself testified that the bid was "an average of 20 per cent . . . a little above on some, a little below on others" (Appendix 299). Hutchinson, one of the Beatrice negotiators, testified that Casserly told him "I have already got one at 20" (Appendix 197). And Stollings (another Beatrice negotiator) testified that Casserly said that "he had 20 per cent off from Broughton on this business" (Appendix 230). The bid actually averaged 10.9 per cent discount off the wholesale list price. (Appendix 646). We find no denial of this fact in the appellant's briefs. It does contend that Commission counsel agreed before the Hearing Examiner that the bid was 20 percent. But Commission Counsel fully explained this. They admitted that in its original proposed findings to the Examiner it stated that the Broughton bid was 20 per cent off. But soon thereafter in its reply findings it told the Examiner that this was an error. It said that only four stores "were granted prices as low as .658, .66 and .68" (CX 103, B-C; G, Z 5) while all of the others ranged from 73.2 cents to 85.65 cents per gallon. (CX 103 B-Z-8). It further stated that cottage cheese—an important item—was "extremely high" in comparison to the final Beatrice proposal. At the time of the Broughton bid the one of Beatrice was 2 cents below Broughton on forty of the forty four stores and the four lower price stores were comparatively small outlets

of Kroger. Moreover, in its appeal brief to the Commission counsel discussed and denounced the bid under the heading: *"Kroger Misled the Dairies Concerning Receipt of a 20% Discount Offer"* (Appendix 560). And at argument before the Commission when Kroger pointed to the proposed finding to the Examiner as an admission that Broughton's bid was 20 percent off the Commission counsel again repudiated this claim and called the attention of the Commission to its prior rejection.

5. Other contentions.

We need not pause long with the remaining claims. The complaint clearly charges Kroger in the exact terms of the Act which, of course, is sufficient. Nor is there substance to the objection that the case was tried on a different theory before the Commission than that pursued before the Hearing Examiner. The release of Kroger by the Hearing Examiner on the theory that it was required because of the acquittal of Beatrice was, of course, attacked before the Commission and caused more attention to be focused on Casserly's testimony. But counsel for the Commission maintained to the Examiner that Casserly had misrepresented the Broughton bid. It necessarily had to give more emphasis to the Casserly testimony in its presentation to the Commission in order to meet the Hearing Examiner's order exculpating Kroger. Indeed, Kroger's strategy before the Hearing Examiner emphasized that its responsibility could not be judged by the acts of Beatrice. Kroger's own counsel repeatedly objected before the Hearing Examiner to the relevance of certain evidence as to Kroger but not to Beatrice on the ground that "independent acts of Party A had nothing to do with the responsibility of

Party B." That is exactly the theory on which the Commission acted in finding Kroger responsible.

Moreover, we find no support for the charge that the Commission holding places the buyer at his peril whenever he engages in price bargaining. The use by the Commission of the "hard bargaining" language as well as the failure of Kroger "to convey any correct information about the price levels being quoted by others is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the "price levels" but the misrepresentation of the Broughton bid.

Finally, Kroger argues that the Commission failed to meet the burden of proving that Kroger knew or should have known that Beatrice's prices were not cost justified and there was no substantial evidence that the differentials on Kroger's private label product injured competition. We find that there is substantial evidence supporting each of the Commission's findings, including these.

As to cost justification, the showing of Beatrice was found by both the Hearing Examiner and the Commission to be entirely inadequate. We agree with this finding. In addition, Kroger was specifically warned by two dairy suppliers of Robinson-Patman Act problems that might result from the lower prices it sought. Still its expert in the purchasing and selling of dairy products, Mr. Casserly, pursued his course. He was a man of extremely wide experience in every line of the dairy industry, including the production, processing and retailing of such products. He knew trade discounts, market conditions and cost accounting. Indeed, Casserly himself built up the cost formula which resulted in discriminations aggregating 39 per cent in some markets and as high as 41 per cent on cottage cheese. In these lights

—coupled with the other circumstances surrounding the transaction—it is beyond question that Kroger knew—or should have known—that Beatrice's prices were not cost justified.

Likewise the differentials that Kroger received impaired competition. We start with the proposition that evidence of discrimination in only one area is sufficient to meet the requirements of the Act. *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F. 2d 674, 681 (5 C.A. 1965), certiorari denied, 382 U.S. 959. Moreover, "a substantial price advantage can afford a favored buyer a material capital advantage . . . which will give him a substantial advantage over his competition." Therefore, as the Fifth Circuit said in *Foremost,* supra: "It is unnecessary that there be evidence that the favored customer actually undersold his rivals." At 680. See also *National Dairy Products Corp.* v. *Federal Trade Commission,* 395 F. 2d 517, 522 (7 C.A. 1968), certiorari denied 393 U.S. 977.

In this case Kroger contends that its purchase of vendor labeled milk from Beatrice should be aggregated with its purchases of private label milk. *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637 (1966). We think that the Commission correctly rejected the application of this principle since Beatrice labeled milk was only sold in 11 of the 44 stores in the relevant areas (CX 37, 64 F-H, 65 A-H; Appendix 296-297, 319, 519-527, 631-645). Moreover, the large Charleston and Logan areas received no Beatrice labeled products and the all-important gallon jug was not available under the Beatrice label in any Kroger store. Furthermore, *Borden* recognizes the competitive advantage which results when disadvantaged competitors are denied a label which the favored buyer receives. Kroger reaped

this very advantage. It received Kroger labeled milk at cheaper prices than it received Beatrice labeled milk and consequently placed its label in a competitively superior position. It did not reduce the retail price of its private label milk and, thereby, pass on lower prices to the consumer, but reaped higher profits for itself. The result was that it sold enormous quantities of milk at higher profits, as is clearly shown by its own chart in Addendum I to its brief filed in this court.

However, the point that the Commission should have treated the private labeled product and the nationally branded one as "goods of like grade and quality," *Borden, supra,* need not be labored. Beyond any question in the three market areas where both labels were sold the discrimination ran from 9.7 to 30.8 per cent and averaged 16 per cent (CX 390).

The Commission properly inferred that there was a reasonable probability of substantial injury to competition since the discriminations were as high as 41 per cent (in cottage cheese); averaged in one market more than 28 per cent, for other markets 17 per cent, and in Charleston, the most important area, more than 12 per cent. See chart, page 34, Commission's brief. The discrimination here is among the highest in a litigated case under the Clayton Act.[4] The record shows that in the retail food business

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[4] Examples of discounts in secondary-line injury cases may be found in *United States* v. *Borden Co.*, 370 U.S. 460, 463-464 (11%); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 41 (5% to 10%); *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F.2d 517, 521 (7th Cir. 1968), *cert. denied*, 393 U.S. 977 (12%); *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F. 2d 674, 675 (5th Cir. 1965), cert. denied, 382 U.S. 959 (5%); *Dean Milk Co.* v. *Federal Trade Commission*, 395 F. 2d 696, 708 (2% to 10%); and *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341, 358 (33%).

"competition is keen and profit margins are low" *Foremost Dairies, Inc., supra,* at 681; *National Dairy Products Corp., supra,* at 522; *Federal Trade Commission* v. *Fred Meyer, Inc., supra,* at 367. In addition it is uncontested that dairy products are often used as "leaders" to attract customers. It follows that the injury found to be present involving a secondary-line here permits wide inferences of adverse competitive effects based on the existence of substantial price differentials. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 46-47 (1948); *American Motors Corporation* v. *F.T.C.,* 384 F. 2d 247, 250-251 (6 C.A. 1967) Cert. denied 390 U.S. 1012; *Foremost Dairies, Inc.* v. *F.T.C., supra,* at 679-680; *National Dairy Products, Inc.* v. *F.T.C., supra,* at 522, *United Biscuit Co.* v. *F.T.C.,* 350 F. 2d 615, 622 (7 C.A. 1965) cert. denied 383 U.S. 926. Indeed, in wholesale fluid milk sales discounts from 5 per cent to 12 per cent have been held to have the required competitive effect on the secondary-line level, *Foremost Dairies, Inc.* v. *F.T.C., supra,* at 679; *Dean Milk Co.* v. *F.T.C.,* 395 F. 2d 696, 708-709 (7 C.A. 1968); *National Dairy Products Corp.* v. *F.T.C., supra,* at 522.

We follow the teaching of *Automatic Canteen, supra,* where the court emphasized:

> "[T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices. Enforcement of the provisions of Sec. 2(f) against such a buyer should not be difficult." At 79.

The order of the Federal Trade Commission is affirmed and enforced.

APPENDIX B

Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20,233

THE KROGER COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, *Associate Justice,*
McCREE and MILLER, *Circuit Judges.*

On Petition for Review of an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the Federal Trade Commission be and it is hereby affirmed and enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal, as itemized below.

Entered by order of the Court.

CARL W. REUSS
Clerk

Order of the Court of Appeals

A TRUE COPY

Attest:

CARL W. REUSS, *Clerk*

By HELEN TOOHEY
Deputy Clerk

(Seal Omitted)

FILED
FEB 25 1971
CARL W. REUSS, *Clerk*

APPENDIX C

Statutes Involved

The Clayton Act, as amended by the Robinson-Patman Act

Subsections 2(a), 2(b) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, provide (15 U.S.C., subsections 13(a), (b) and (f)):

Subsection 2(a)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds neces-

sary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

Subsection 2(b)

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to

meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Subsection 2(f)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by this section."

The Administrative Procedure Act

In pertinent part, the Administrative Procedure Act provides (5 U.S.C. (Supp. V), §§ 554(a), (b)(2)(3)):

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.

* * *

"(b) Persons entitled to notice of an agency hearing shall be timely informed of—

* * *

"(2) the legal authority and jurisdiction under which the hearing is to be held; and

"(3) the matters of fact and law asserted."

APPENDIX D

Regulations Involved

Rules of Practice for Adjudicative Proceedings, Federal Trade Commission

The Federal Trade Commission's Rules of Practice for Adjudicative Proceedings provide, in pertinent part (Rule 341(d), 16 C.F.R. § 341(d); Rule 341(a), 16 C.F.R. § 354 (a)):

Rule 3.41(d)

"*Adverse Witnesses.*—An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him."[1]

Rule 3.54(a)

"Upon appeal from or review of an initial decision, the Commission . . . will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."

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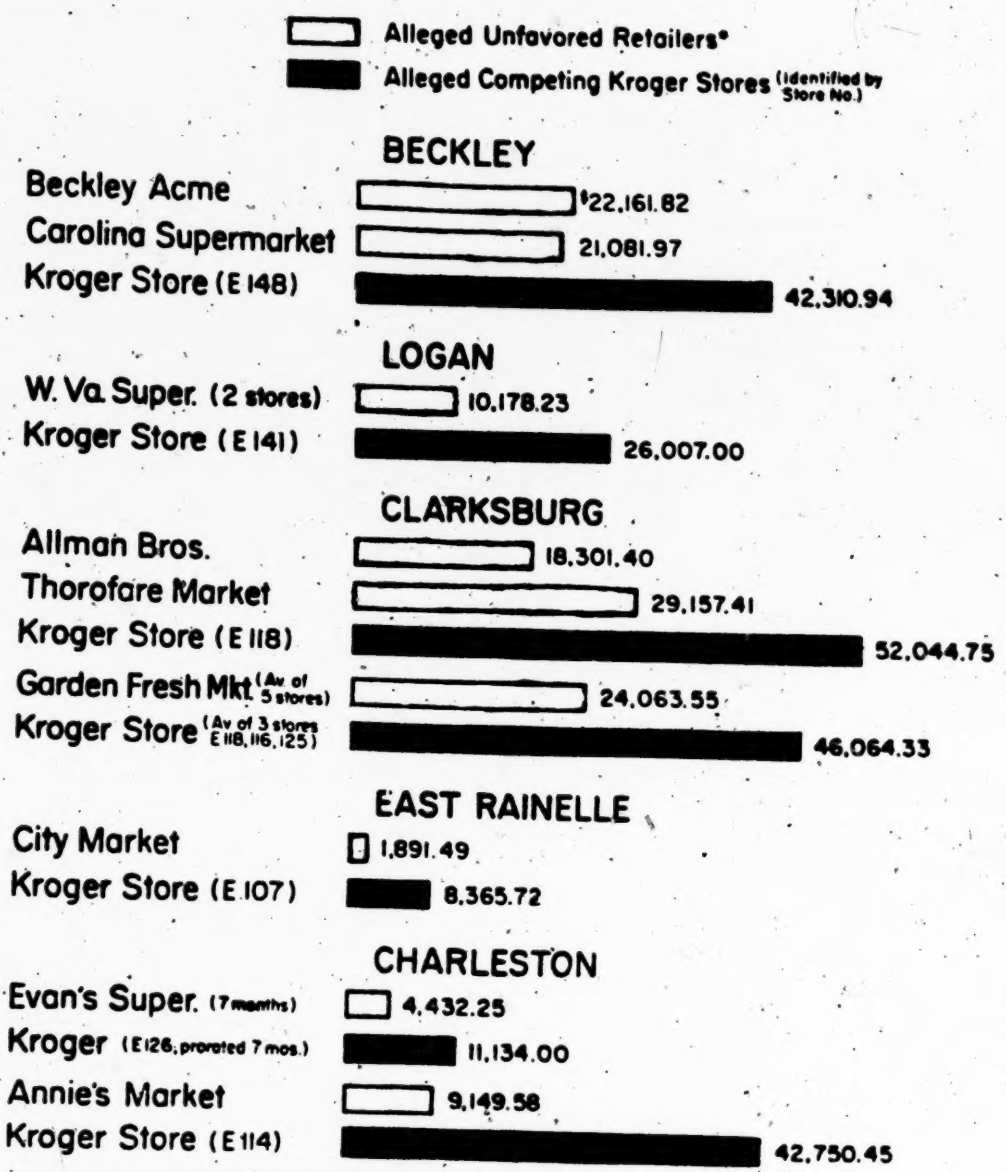
[1] Rule 3.16(e) of the Rules in effect when the Commission hearing was held. 16 C.F.R. (1960 Ed.) § 3.16(e).

ADDENDUM I

COMPARATIVE PURCHASE VOLUMES FROM BEATRICE MILK AND COTTAGE CHEESE - JUNE 1962 - MAY 1963



Sources:

UNFAVORED RETAILERS: Complaint Counsel's Appeal Brief, Appendix VI: 2d Data Column.
COMPETING KROGER STORES: RDX 109B (Volumes); CX 308 and 88 (Competitive Relationship).

*I.e., every other retailer for whom Complaint Counsel Specified Purchase Volumes from Beatrice in their Appeal Brief (Appendix VI).

Average Price Discrimination and Resulting Injury to Kroger's Competitors In the Purchase of Milk and Cottage Cheese During Stipulated Time (June 1962-October 1963) In the Relevant Markets

Market Area	Competitors of Kroger	Prices Actually Paid Beatrice for Total Purchases of Milk and Cottage Cheese	Prices if Kroger had made Identical Purchases	Difference in Prices Showing Injury in Dollars	Injury in Percent
Beckley	Beckley Acme	$39,403.05	$ 32,502.58	$ 6,900.47	17.51%
	Carolina Super Market	38,014.49	31,524.34	6,489:15	17.07%
Charleston	Annie's Market	14,781.32	12,975.89	1,805.43	12.21%
	Evans Supermarket[37]	5,298.59	4,432.25	866.34	16.00%
Clarksburg	Thorofare Market	48,488.58	41,176.61	7,311.97	15.11%
	Allman Brothers	30,373.90	25,952.80	4,421.10	14.55%
	Garden Fresh Markets[38]	176,336.04	158,303.95	18,032.09	10.22%
Logan	W. Va. Supermarkets	18,277.10	15,627.59	2,649.51	14.5 %
Lewisburg	City Market East Rainelle	3,670.40	2,642.15	1,028.25	28.01%

[37] Figures for cottage cheese were not available and figures for milk was available only to December 1962, therefore, the data reflect only purchases of milk from June-December 1962 (A 621).

[38] Cottage cheese figures were not available and the month of October is not included (A 624).

SUPREME COURT, U. S.

FILED
26 1971
E. ROBERT SEAVER, CLERK

No. 70-202

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE KROGER CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. CA: 1-15) is reported at 438 F.2d 1372. The initial decision of the hearing examiner (Pet. Sep. App. ID: 99-169) and the final order and opinions of the Federal Trade Commission (Pet. Sep. App. FT: 1-89, D: 90-98) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. CA: 16-17) was entered on February 25, 1971. The petition for a writ of certiorari was filed on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who, through knowingly misrepresenting the prices quoted by a competing seller, induces his seller to grant prices below those offered by the seller's competitors, violates the prohibition in Section 2(f) of the Robinson-Patman Act against inducing unlawful price discriminations, even though the seller's discriminatory prices were not illegal because justified as a good faith attempt to meet what it believed were its competitors' lower prices.

2. Whether the finding of the Federal Trade Commission that the Kroger Company knowingly induced and received discriminations in price, thereby violating Section 2(f) of the Robinson-Patman Act, is supported by substantial evidence and is in conformity with applicable law.

STATUTES INVOLVED

Subsections 2 (a), (b) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a), (b) and (f), provide in relevant part:

> SEC. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Co-

lumbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition, with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(f) That it shall be unlawful for any person engaged in commerce, in the course of such

commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 554 of the Administrative Procedure Act, 80 Stat. 384, 5 U.S.C. 554 (Supp. V), provides in relevant part:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of
>
> * * * * *
>
> (2) the legal authority and jurisdiction under which the hearing is to be held; and
>
> (3) the matters of fact and law asserted.

STATEMENT

In 1965 the Federal Trade Commission issued a complaint (Pet. Sep. App. 170–179) charging Beatrice Foods Company ("Beatrice") with selling fluid milk and other dairy products under private label to petitioner Kroger Company at prices substantially below those at which it sold products of like grade and quality to Kroger's retail competitors, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a). In a separate count, the complaint charged Kroger with violating Section 2(f) of the Act by knowingly inducing or receiving unlawful discriminations in price from Beatrice. Following a hearing, the trial examiner dismissed the complaint against both parties (Pet. Sep. App. ID: 101–169). The Commission affirmed the examiner's determination that Beatrice had established a good faith meeting-of-competition defense under Section 2(b) of the Act (Pet. Sep. App. FT:4, 70–71,

88), but held that Beatrice's defense did not thereby immunize Kroger, which had reason to know it was obtaining substantial price discriminations from Beatrice that were not cost-justified and were below prices offered by Beatrice's competitors (*id.* at 89). The Commission therefore held that Kroger had violated Section 2(f). The Court of Appeals for the Sixth Circuit unanimously affirmed (Pet. App. CA:1–15).

1. Kroger is the nation's third largest operator of retail supermarkets, with annual sales in excess of 2 billion dollars. In 1963 it owned more than 1400 supermarkets located in 19 states. In 1962–1963, Kroger's Charleston Division included 44 supermarkets located in West Virginia, eastern Kentucky and southern Ohio. Kroger was the largest retailer of grocery products in the Charleston market during this period, with combined annual sales of approximately 68 million dollars. In 1961, Kroger sales of dairy products in that market exceeded 2 million dollars. (Pet. Sep. App. FT. 8–9, ID:109–111; CX 88A, CX–156.)[1]

Prior to 1962, all dairy products in the Charleston area were marketed under brand names of the dairies, and most retail stores carried two or more such brands in their dairy counters. Customers received the "full service" method of milk distribution: routemen delivered and stocked the dairy cases. Prices generally were based on a percentage discount from

[1] "CX" refers to Commission exhibits; "Tr." refers to the hearing transcript.

wholesale list, and fluctuated from section to section of the Charleston market according to prevailing competitive conditions (Pet. Sep. App. FT:11–12).

The series of negotiations that culminated in Kroger's challenged conduct began in November 1961, when Kroger decided to explore private-label dairy sales for supermarkets in its Charleston Division, and "specially designated" Mr. Francis Casserly, manager of an adjacent division, to conduct negotiations with Charleston Division dairies (Pet. Sep. App. FT:83). Casserly, who possessed "a thorough knowledge of the dairy industry" (*ibid.*) and "who was well experienced in private label operations" (*id.* at 43), made a careful analysis of dairy production and pricing in the Charleston area (Pet. Sep. App. ID:146; Tr. 566–575). He initially invited several dairies then serving Kroger stores with their own brands—including Valley Bell, Broughton, Borden and Fairmont—to submit bids for bottling Kroger label milk for use in all Charleston Division stores.

Broughton Dairy responded first. On January 6, 1962, it submitted a bid (CX–103) containing tabulations for each Kroger store location, showing the existing retail price, the corresponding wholesale price, the proposed private label price, and a percentage figure for Kroger's gross profit. The prices contained in Broughton's bid averaged 77 cents per gallon jug, although some were as high as 86 cents for certain stores (CX–103). Computations based on the Broughton proposal reveal that "prices in the bid averaged

a discount of 10.9 per cent" off list (Pet. App. CA:5; Pet. Sep. App. FT:15–16).[2]

In notifying the other dairies of Broughton's offer, Casserly depicted this as being "in the neighborhood of 20 percent off list" (Tr. 375, 595–596, 717)—a discount which, as a Beatrice Foods representative later testified, "was pretty much unheard of in this market area at that time" (Tr. 489).[3] Casserly further informed the dairies that he expected a discount greater than 20 percent because of the larger volume of milk Kroger would require for the Charleston Division, because only a "stripped service" was being requested, and because of the general deterioration in wholesale milk prices in the Charleston area (Pet. Sep. App. ID:118).

On January 12, 1962, Beatrice representatives met with Casserly to discuss participation in the private-label bidding.[4] Casserly stated that he had already met with representatives of Fairmont and Broughton, and that Broughton had proposed discounts of 20 percent off list price (Tr. 487–488). He summarily rejected Beatrice's offer of a 15 percent discount stating, "[F]orget it, I have already got one at 20" (Tr. 375). On

[2] It is undisputed that the price per gallon jug was the most important item in the negotiations, see *e.g.*, Tr. 388.

[3] This was the discount at which Broughton supplied private-label dairy products, on a full service basis, to the Columbus Division (Tr. 717).

[4] Casserly had not initially notified Beatrice, which at that time served 26 Kroger supermarkets under its own brand, because of what he considered to be deficiencies in its milk containers. Beatrice representatives assured Casserly that they could furnish the containers desired, and he then invited their bid (Tr. 370–372).

February 9, 1962, Beatrice representatives quoted a price of 71 cents for a gallon jug of milk, arrived at by applying a discount of 16 to 17 percent to a base figure of 85 cents (Tr. 494–495).[5] Casserly again rejected this on the basis that he had received a bid from Broughton offering 20 percent off list (Tr. 495).

After receiving bids from the other dairies and another bid from Broughton,[6] Casserly again met with Beatrice representatives, who revised their offer to 68 cents per gallon jug. This quotation was intended to meet the "20 percent discount, the Broughton discount from the 85-cent jug" (Tr. 497). Casserly told the Beatrice representatives that "now you are getting—you are in a position of being competitive with some of the other people" (Tr. 498). After further negotiations, Casserly accepted Beatrice's later proposal of 66 cents per gallon jug and in June 1962, Beatrice began supplying Kroger stores with private-label dairy products. Beatrice continued to charge its other retail customers in the Charleston area the list price less discounts ranging from 5 to 15 percent (Pet. Sep. App. ID:138).

[5] Trade discounts in the Charleston Division at that time "were generally ten per cent, some of them as high as 15 per cent" (Tr. 495).

[6] Broughton made a second offer of 72 cents for a gallon jug on February 12, based on a cost-plus formula (CX–106); in March, it proposed prices ranging from 66 cents to 69 cents, based upon lowered raw milk costs (Pet. Sep. App. ID:125). Fairmont's first proposal, made in late February, contained prices that ranged, in the five key West Virginia sub-markets, from 66 cents to 82 cents for a gallon jug (Pet. Sep. App. FT:27; CX–125). After a further meeting with Casserly, Fair-

2. The Commission, agreeing with the hearing examiner, concluded that Beatrice had granted substantial discriminations in price to Kroger during the term of the private label contract.[7] The Commission found that the discriminations averaged more than 28 percent in one market, 17 percent in other markets, and 12 percent in Charleston (Pet. Sep. App. FT:48-51; Pet. App. CA:14).[8] In cottage cheese the price discrimination was as high as 41 percent (*ibid.*).

However, the Commission upheld the examiner's dismissal of the charges against Beatrice under Section 2(a) of the Robinson-Patman Act (see p. 4, *supra*), on the basis that the evidence sustained Beatrice's good faith meeting-of-competition defense under Section 2(b) of the Act (Pet. Sep. App. FT:69, ID: 168).

As to the charges against Kroger under Section 2(f), which the examiner had also dismissed, the Commission concluded that "the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays his cards so close to his vest as to persuade the seller to come down just a little

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mont submitted an alternative bid on March 9, based upon fluctuations in the cost of raw milk, quoting prices from 65 cents to 73 cents for a gallon jug (Pet. Sep. App. FT:28-29; CX-123; Tr. 622). Borden submitted three alternative proposals in March; these varied with the service and form of delivery rendered (CX-97). Only one dairy, Valley Bell, declined to submit a proposal. (Pet. Sep. App. ID:123; CX-137).

[7] By stipulation, the parties agreed to limit the time period involved to June 1962 through October 1963.

[8] The examiner found that the discriminations averaged 16 percent, and were as large as 30.8 percent (Pet. Sep. App. ID:146).

more, and not on the seller who has tried by every proper means to feel out the opposition" (*id.* at 68).[9] Noting Kroger's pre-eminent bargaining position in relation to its dairy sellers, the Commission found that "Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was 'competitive' without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others" (Pet. Sep. App. FT:81, emphasis in original).

3. The Court of Appeals for the Sixth Circuit unanimously affirmed in an opinion by Mr. Justice Clark, sitting by designation. The court held that "the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices" (Pet. App. CA:9). Thus, in order for the buyer to obtain immunity under Section 2(b), the

[9] Only Commissioner Jones found Kroger alone to have violated the statute (Pet. Sep. App. FT:4–89). Commissioners Dixon and MacIntyre expressly concurred in Commissioner Jones' holding as to Kroger, although they favored holding Beatrice liable as well (*id.* at 90–95). Commissioners Elman and Nicholson dissented, concluding that no violation of the Robinson-Patman Act had occurred (*id.* at FT:89, D:96–98).

discriminations "must come within the defenses of that section not only from the seller's point of view but also from that of the buyer" (*id.* at 10). The court held that the Commission's findings of misrepresentation of the Broughton bid were "fully supported by substantial evidence throughout the record" (*id.* at 10), that counsel for the Commission had timely raised before the hearing examiner the issue of Kroger's misrepresentation, and that throughout the proceedings Kroger had been adequately apprised of the charges against it (*id.* at 11).

ARGUMENT

1. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f), makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section." [10] A major reason for the Act was the economic evils associated with the buying power of the large chain stores. 79 Cong. Rec. 9078 (1935); 80 Cong. Rec. 8111, 9415 (1936). Cf. Federal Trade Commission, *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess.

[10] Price discriminations barred by Section 2 are those which discriminate "between different purchasers of commodities of like grade and quality," whose effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowlingly receives the benefit of such discrimination, or with customers of either of them," and which cannot be justified by cost differentials inherent in the transaction, Section 2(a), 15 U.S.C. 13(a). The Commission found each of these requirements satisfied in the present case (Pet. Sep. App. FT: 59–66, 71–80), a determination the court of appeals upheld as supported by substantial evidence (Pet. App. CA: 12–15). Kroger does not challenge these findings here.

(1935). Accordingly, the Act was designed "to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168 (emphasis supplied); *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349. Section 2(f), the "buyer provision" of the Act, serves an important function under this statutory scheme: its purpose is to reach "the buyer * * * who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." *Automatic Canteen Company* v. *Federal Trade Commission*, 346 U.S. 61, 79.

The Commission's finding that Beatrice acted in good faith, reasonably intending to meet the equally low price apparently offered by a competitor, in no way undermined the essential fact that Kroger, the largest grocery chain in the Charleston market, induced and received discriminatory prices likely to injure competition, knowing or having reason to know that such prices were not cost-justified and did not, in fact, meet competition. Kroger asserts, however, that Section 2(f) can be applied only when a seller has violated Section 2(a). It argues that a buyer, no matter how culpable, cannot violate Section 2(f) whenever his seller has a valid defense under Section 2(b).

Acceptance of Kroger's argument would lead to the anomalous result that a defense available to the seller only because of the buyer's affirmative misrepresentations must also shield the buyer. Yet the

resulting price discrimination in the buyer's favor is precisely the evil Congress sought to prevent when it enacted Section 2. Moreover, Section 2(f) "was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Automatic Canteen Company, supra,* 346 U.S. at 73. But in this case Kroger's false statement of Broughton's bid led the other sellers to believe that offers meeting that purported bid would be lawful. In short, by inducing discriminatory prices through affirmative misrepresentations, Kroger not only brought about a buyer-seller arrangement inimical to the public interest, but also, in the process of accomplishing this result, effectively deprived its potential sellers of the protection Congress sought to provide them through Section 2(f).

Congress could not have intended buyers, such as Kroger, to be allowed to immunize themselves from Section 2(f) by falsely representing outstanding offers. The language of Section 2(f) supports this conclusion. To be sure, that provision only makes it unlawful for a buyer to induce or receive a "discrimination in price which is prohibited by this section" and, under Section 2(b), a seller can offer a discriminatory price if it does so in order to meet "an equally low price of a competitor." Beatrice, the seller in this case, did not violate Section 2(b) because it believed in good faith that it was meeting a competitor's apparent low bid. But in telling Be-

atrice about Broughton's bid, Kroger knew that such a bid had not in fact been made. Kroger therefore knowingly induced and received a "discrimination in price" prohibited by Section 2: from Kroger's point of view the price it sought was in fact unlawful, even though the person offering that price did not thereby violate the Act. Section 2(f) is primarily aimed at buyers; it does not require a guilty seller. The Commission so held and the court of appeals agreed. (Pet. Sep. App. FT: 82; Pet. App. CA: 9.)

This Court's statement in *Automatic Canteen Company, supra*, 346 U.S. at 74, that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses * * * or not known by him not to be within one of those defenses" is accurate as a general proposition, which was all that was needed to decide the narrow issue in that case "involving simply the burden of coming forward with evidence under § 2(f) of the Act," 346 U.S. at 65. That statement is not controlling in the quite different factual situation involved in this case. Indeed, in *Automatic Canteen* itself, the Court cautioned against "inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings," 346 U.S. at 65, a danger that is particularly acute with respect to the Robinson-Patman Act.

2. Contrary to Kroger's claim (Pet. 21–22), the decision below will not place "buyers at their peril," nor will it force "price uniformity and rigidity."

Kroger is not precluded from "sturdy bargaining" [11] and "haggling" [12]; it is barred only from affirmatively misrepresenting competitor bids when it has reason to believe that its seller will rely on those misrepresentations and be induced to offer discriminatory prices.[13]

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[11] *Automatic Canteen*, *supra*, 346 U.S. at 74.

[12] *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 403.

[13] The related problems of price conformity and price verification were recently considered in *Wall Products Co.* v. *National Gypsum Co.*, 1971 Trade Cases ¶73,523 (N.D. Cal. 1970). There wallboard sellers agreed among themselves to exchange and verify price information regarding competitor bids supplied by their customers, an arrangement similar to that found to violate Section 1 of the Sherman Act in *United States* v. *Container Corp.*, 393 U.S. 333. The district court nevertheless upheld the arrangement, partly on the ground that such price verification was a necessary predicate to establishment of a meeting-competition defense under Section 2(b) of the Robinson-Patman Act. The court believed that this question had not been raised in *Container*. In fact, the verification problem was argued in *Container* (see Brief for Appellees at 42–43, No. 27, O.T. 1968), but neither the majority nor the dissenting opinions expressly discuss it.

In view of the severe anticompetitive potential of agreements to exchange actual price bid information, see *Container Corp.*, *supra*, we believe the instant case reflects a far better accommodation between the Sherman and Robinson-Patman Acts. The seller, without resorting to verification, can avail himself of a meeting-competition defense based on customer information regarding competitive bids unless the Commission can prove actual or imputable knowledge that the information was false. See *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F. 2d 517, 523 (C.A. 7), certiorari denied, 393 U.S. 977; *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F.2d 47, 53–55 (C.A. 1), certiorari denied, 380 U.S. 906. And, as the decision below makes clear, the Commission must prove that the buyer has "given 'false price information'" to establish a

The evidence establishes that Beatrice quoted a 20 percent discount in reliance upon Casserly's misrepresentation of the Broughton offer as being about 20 percent off list (*supra*, pp. 7–8). The evidence also shows that Beatrice's final bid was the lowest, and that Casserly accepted it on that basis (Pet. Sep. App. FT: 41–42, 46). Thus, known to Kroger but unknown to Beatrice, Beatrice undercut all competitive offers, including that of Fairmont, which was also responsive to Casserly's misrepresentation with respect to the initial Broughton proposal. The Commission properly found Kroger to have violated Section 2(f) by inducing and receiving discriminatory and anticompetitive prices from its seller as a direct consequence of its deception and overreaching. See *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 365–367 (C.A. 9), reversed on other grounds, 390 U.S. 341; *Giant Food, Inc.* v. *Federal Trade Commission*, 307 F.2d 184, 186–187 (CA.D.C.), certiorari denied, 372 U.S. 910.

3. Kroger's remaining contentions are without substance. Kroger asserts it was not until the case reached the Commission that Commission counsel first disputed Casserly's characterization of the Broughton bid, thereby denying Kroger procedural due process (Pet. 23–24). The record is to the contrary. Commission counsel unequivocally stated in a reply memorandum filed with the hearing examiner two months

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Section 2(f) violation against the buyer. (Pet. App. CA 2.) Neither buyer nor seller acts at his peril, and hard bargaining is not inhibited, since good faith furnishes a complete defense to a Section 2 charge.

prior to his initial decision, that with respect to the alleged 20 percent Broughton discount, "[i]n actuality, an examination of this Broughton proposal shows that it did not offer a uniform 20% discount and that the prices offered Kroger in this proposal were substantially higher than those granted by Beatrice." [14] The court of appeals correctly held that before the examiner, Kroger was fully apprised of Commission counsel's challenge to Casserly's representation of the initial Broughton discount (Pet. App. C.A.: 11).

There is no basis for Kroger's claim that the complaint and the hearing did not give it adequate notice of its independent liability under Section 2(f) of the Act (Pet. pp. 24–26). Count II of the complaint charged Kroger with having violated Section 2(f), in language almost identical to that in the Act.[15] Pleadings before the Commission in the language of the statute are sufficient. *A. E. Staley Mfg. Co.* v. *Federal Trade Commission,* 135 F.2d 453, 454 (C.A. 7).

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[14] See "Reply of Counsel Supporting the Complaint to Respondent's Proposed Findings of Fact, Conclusions of Law and Supporting Memorandums," filed on July 21, 1967.

[15] The complaint charged, *inter alia* (Pet. Sep. App. SD:175–176): "In the course and conduct of its business in commerce, Kroger has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

"For example, respondent Kroger, in its negotiations with respondent Beatrice, before and after June 4, 1962, for the supply of fluid milk and other dairy products under private label to the stores of Kroger's Charleston Division, knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I of this complaint. * * *"

Moreover, in arguing that the hearing was conducted on the sole premise of Kroger's derivative liability, Kroger ignores its own repeated objections to the relevance of certain evidence to Kroger but not Beatrice (Tr. 203–204, 251, 476, 1412, 2445). Indeed, Kroger, through its counsel, stated: "[T]here is no conspiracy charge in this case. The independent acts of Party A had nothing to do with the responsibilities of Party B" (Tr. 476). As the court of appeals noted: "[t]hat is exactly the theory on which the Commission acted in finding Kroger responsible" (Pet. App. CA:12).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-202

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As will appear, the reasons for granting a writ of certiorari are fortified by the Brief in Opposition (hereafter "Opp."). In essence it simply parrots the unwarranted impeachment of Casserly below (Petition 7-9, 23-25).[1] There is no denial that this is a case of first impression. Respondent's position invites the anticompetitive exchange of price information among sellers. Respondent does not mention its own issuance of a complaint—seven weeks before its brief was filed—by which it acknowledged that Section 5 of the Federal Trade Commission Act is the proper basis for testing a buyer's bargaining conduct. In arguing that Petitioner received adequate notice of the issues resolved below, Respondent's sole precedent is a case decided on a stipulated record, three years before the Administrative Procedure Act was passed.

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[1] Hereafter "Pet."

I. *Respondent Improperly Solicits The Court To Rewrite Subsection 2(f).*

Beyond the lack of precedent,[2] neither Respondent's analysis, nor any policy consideration, supports the attempt to downgrade the square holding of *Automatic Canteen* against 2(f) liability when the price is "within one of the seller's defenses" (346 U.S. at 74). Admitting that this principle is "accurate as a general proposition," Respondent would escape it as a mere casual reference "needed to decide the narrow issue in that case 'involving simply the burden of coming forward with evidence under § 2(f) of the Act' " (Opp. 14). However, Mr. Justice Frankfurter's opinion is clear that this Court's determination that buyer liability is purely derivative followed an exhaustive study of § 2(f)'s "substantive prohibition" (346 U.S. at 74).

It makes no difference that 2(f) might be desirably strengthened—which, like Commissioner Elman (D: 98), we question[3]—by rewriting it to cover "a discrimination in price which is [NOT] prohibited by this section." As this Court held in *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952):

> "Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

The Court "cannot supply what Congress has studiously omitted." *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

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[2] Respondent cites no precedent sustaining the decision below because there is none. All other authorities unanimously followed the derivative 2(f) rule of *Automatic Canteen* (Pet. 18-20).

[3] See pp. 4-7, *infra*.

Nor does Respondent overcome the "prohibited" discrimination requirement of 2(f) by arguing that Beatrice's price, although lawful for it, was "prohibited" to Kroger, due to alleged overstatement of the Broughton discount offer (Opp. 13-14). The fallacy of this claim is apparent from Respondent's calculated deletion of the language in brackets in quoting the following passage from *Automatic Canteen* (346 U.S. at 74; Opp. 14):

> "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses [SUCH AS THE COST JUSTIFICATION] or not known by him not to be within one of those defenses."

Respondent itself admits that in seeking a lower price, Casserly was prompted by cost-saving considerations authorized by the Act, rather than a purpose to induce an illegal price discrimination.[4] According to Respondent, his basic motivations were "the larger volume of milk Kroger would require for the Charleston Division" and the fact that "only a 'stripped service' was being requested" (Opp. 7).[5] It is also acknowledged that Kroger was negotiating for "products under private label" (Opp. 4). "There are readily recognizable actual cost differences between [dairy] brand and private label which will justify differences in price." *The Borden Co.*, 62 F.T.C. 130, 181 (1963).[6]

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[4] It is undenied that at the virtual start of negotiations, on January 25, 1962, Casserly informed Beatrice that its competition was Fairmont, not Broughton (Pet. 11-12 and n. 19). See Appendix below, Volume II, at 204 (lodged with the Clerk of the Court).

[5] It is undenied that Kroger's individual store requirements far exceeded those of any other Beatrice customer (Pet. 6 and n. 7).

[6] The emptiness of the effort to use Casserly's comments about Broughton as a means of converting Beatrice's price into a "known" prohibited discrimination is further evidenced by the undenied

[*footnote continued on next page*]

2. *The Decision Below Conflicts With The Policy Of The Antitrust Laws And With Automatic Canteen's Admonition Against Emasculating A Buyer's Right To Bargain.*

Accepting *arguendo* the Government's allegations about Kroger's negotiating conduct—which we deny[7]—the national policy of preserving a competitive economy is incompatible with the presently attempted construction of 2(f). The touchstone is *Automatic Canteen's* warning against interpretation of the Robinson-Patman Act to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63) and its consequent emphasis on the necessity of a construction allowing "sturdy bargaining between buyer and seller" (*id.* at 74).

Respondent's present position flatly conflicts with those principles, notwithstanding its professed concern for reconciling the price discrimination law and the Sherman

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facts concerning (a) the virtual elimination of the differential between Kroger's private label and Beatrice's brand prices, upon the introduction of cost-plus, limited service terms to the trade at large (Pet. 14); (b) the unparalleled assurances furnished by the dairies to Kroger that their stripped-service, cost-plus prices were lawful (Pet. 11); (c) the admission that Broughton's discount quotations allegedly "averaged 77 cents per gallon jug" (Opp. 6), compared to "cost-plus formula . . . prices ranging from 66 cents to 69 cents" (Opp. 8 n. 6); and (d) the finding that Fairmont adhered to its original discount proposal, but that its cost-plus quotations were "substantially lower than prices under the discount schedule" (FT:28).

[7] Respondent's Brief nowhere disputes our refutation of the claim that Casserly misrepresented Broughton's offer (Pet. 7-9), including, *inter alia*, the silence of the Initial Decision concerning any challenge to his credibility (Pet. 25). The tactic is to treat the incrimination of Casserly as established fact, on the hypothesis that the Court will not bother to consider Respondent's improper basis for the accusation (Pet. 8-9) or the injection of the question in violation of the Administrative Procedure Act and the Commission's Rules (Pet. 23-26). See pp. 10-12, *infra*.

Act. In this connection, it attacks the recent decision in *Wall Products Co.* v. *National Gypsum Co.*[8] The contention is that the court there improperly invoked 2(b) of the Robinson-Patman Act as a basis for allowing sellers to compare price information, in defiance of this Court's ruling in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), against "agreements to exchange actual price bid information" (Opp. 15 n. 13). According to Respondent, "the instant case reflects a far better accommodation between the Sherman and Robinson-Patman Acts" (*ibid.*). This analysis is shallow.

First, under Respondent's view, only the form, not the result, will differ from *Wall Products, supra.* Respondent expressly invites sellers to obtain "customer information regarding competitive bids" (Opp. 15 n. 13). Consequently, instead of consulting among themselves, sellers will shift to buyers as conduits for the exchange of price information. Since "customer information" will have to be "correct information" (Opp. 10), subsection 2(f) will simply be substituted for 2(b) as a shield for the practice. Moreover, since the prices will concern bids for *current* business, the anti-competitive potential will be more severe than in *Container, supra,* which involved *past* prices "concerning specific sales to identified customers" (393 U.S. at 334).

Second, under Respondent's "correct information" standard (Opp. 10), the buyer's bargaining capability will be undermined. A buyer cannot bargain, but will be left at the mercy of his "commercial antagonists, sellers," if required "to lay all his cards face up on the table." *Forster Manufacturing Co.* v. *FTC,* 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965). In consequence, the initially offered price will typically become

[8] 326 F. Supp. 295, 312-13 (N.D. Cal. 1971).

the floor price. For one thing, 2(b) in terms specifies that a seller may "meet an *equally* low price of a competitor."[9] Once notified that he is undercutting a competitor's price, he will lose the 2(b) defense unless he retracts his offer.[10] For another thing, the cost justification defense will hardly encourage sellers to underbid. Reliance on that defense is notoriously hazardous. In *Automatic Canteen*, the Court spoke of "the considerable burden a seller . . . may have in demonstrating costs" (346 U.S. at 69), and further noted:

> "Proof of a cost-justification being what it is, too often no one can ascertain whether a price is cost-justified" (*id.* at 79).

The prescience of these comments was subsequently demonstrated by the cost-justification burdens imposed in *United States* v. *Borden Co.*, 370 U.S. 460 (1962).

It follows that Respondent urges the precise result against which this Court warned in *Automatic Canteen*—*i.e.*, "putting the buyer at his peril whenever he engages in price bargaining." 346 U.S. at 73. The vice is compounded and the necessity for review accentuated by a proposed complaint—next considered—which Respondent released on June 2, 1971, but unaccountably ignores in its present Brief, filed seven weeks later, on July 26, 1971. *The Great Atlantic & Pacific Tea Company, Inc. and Borden, Inc.*, 3 CCH

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[9] Emphasis supplied here and throughout.

[10] The seller's reasonable belief that he is meeting a competitor's price is the basis of the authorities sanctioning the 2(b) defense when the competitive price is undercut. He must then "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). There can be no such belief, supporting a lower price, when the actual competitive price is disclosed.

TRADE REG. REP. ¶ 19,639 (hereafter "*A&P-Borden*").[11] Respondent's press release and complaint in that matter are attached as Appendices A and B.

3. *Respondent Has Recently Acknowledged That Section 5 Of The Federal Trade Commission Act Is The Appropriate Basis For Evaluating A Buyer's Bargaining Conduct.*

The *A&P-Borden* complaint confirms our views (a) that the validation of the seller's 2(b) defense forecloses 2(f) liability (Pet. 17-20); and (b) that there is no *ad hoc* justification for the decision below, since Section 5 of the Federal Trade Commission Act provides the appropriate mechanism for testing the propriety of a buyer's bargaining conduct (Pet. 22-23). The subject matter of *A&P-Borden* is likewise a dairy's provision to a grocery retailer of lower prices for private label milk in one area—there Chicago, Illinois—pursuant to competitive bidding.

In brief, the complaint omits any 2(a) charge whatever against the seller, Borden. It states both a Section 5 count and a separate 2(f) count against the buyer, A&P. Each of those counts alleges illegal inducement of a discriminatory price because of A&P's failure to notify Borden that it had undercut a competitor's price.[12] The complaint is

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[11] Rule 2.31 of the Commission's Rules of Practice provides for the issuance of "a form of complaint which the Commission intends to issue, together with a proposed form of order" (16 CFR § 2.31), as a prelude to possible settlement "by the entry of a consent order." Rules 2.32-2.34, 16 CFR §§ 2.32-2.34.

[12] The Section 5 count against A&P alleges (*A&P-Borden*, Appendix B, *infra*, PARAGRAPH NINE, p. 4):

> "At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession.

[*footnote continued on next page*]

accordingly structured to set up a decision against the buyer, even if 2(b) prevents a ruling that the seller's price is prohibited. *A&P-Borden* thus negates any necessity for distorting 2(f) by an interpretation holding the buyer guilty of receiving a "prohibited" price discrimination, notwithstanding an adjudication that the seller lawfully granted the price.

In contrast to this case, the Section 5 count in *A&P-Borden* provides the common sense method for testing the buyer's bargaining conduct. Instead of nullifying the buyer's bargaining capability—by a rule-of-thumb construction of "the Robinson-Patman Act to convert it into a 'truth-in-bargaining' statute" (Commissioner Elman, dissenting, D: 97)—the flexibility of Section 5 leaves room for reviewing his conduct in the total context of all relevant factors.

As stated by the House Managers of the Conference Committee, which reported the bill enacted as the Federal Trade Commission Act (H. Rep. No. 1142, 63rd Cong., 2nd Sess. at 19):

> "Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances." [13]

A & P accepted the said offer of Borden *with knowledge that Borden had granted a substantially lower price* than that offered by the only other competitive bidder and *without notifying Borden of this fact.*"

The 2(f) count incorporates the above language by reference (*id.* COUNT TWO, pp. 4-5). There is also a Section 5 count alleging an illegal price combination between A&P and Borden, (*id.* COUNT THREE, pp. 5-6).

[13] This Court has similarly recognized the flexibility of Section 5. See, *e.g., Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1965); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 532-33 (1935); *FTC* v. *Keppel and Brother, Inc.*, 291 U.S. 304, 310-12 (1934).

This points to the realism of the Section 5 approach. No complete catalog can be stated of all factors which might be relevant in determining the propriety of a buyer's bargaining negotiations. But some can be suggested. Among them are differences, if any, in the terms of sale and delivery sought by the buyer, compared with the seller's other customers; whether the buyer is seeking brand or private label product;[14] the pressures, if any, exerted by the buyer;[15] the representations made by the sellers to the buyer concerning the bases of their offers;[16] the reasonableness or exorbitance of the brand prices regularly quoted by the sellers; and the competitive structure of the market, including the uniformity or disparity of the prices quoted by ostensible competitors.

The *A&P-Borden* complaint points up the need for prompt review of the decision below. Respondent was not content with the Section 5 unfair competition count in that complaint, but included a 2(f) count. This indicates that the denial of certiorari here will invite abandonment of the use of Section 5 in favor of the application of 2(f) on a virtual *per se* basis—without considering the total circumstances—whenever the buyer fails to provide sellers with correct "information regarding competitive bids" (Opp. 15 n. 13).

Indeed, under the theory of the *A&P-Borden* complaint, the buyer could not even stand mute. The alleged vice there

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[14] Unlike Kroger, other retailers admittedly bought "under brand names of the dairies" and "received the 'full service' method of milk distribution" (Opp. 5).

[15] The Commission's majority opinion dispels coercion by Kroger as a basis for its decision (FT: 80-81).

[16] There is no parallel in any case to date for the definitive assurances to Kroger that the dairies' offers were cost-justified because of the substantial differences between the regular service to other customers and the stripped service method of delivery to Kroger (Pet. 11; Opp. 5, 7).

was A&P's receipt of a lower price "without notifying Borden of this fact" (p. 7 n. 12, *supra*).

The Court is familiar with the all too frequent protraction of proceedings before the respondent agency. *FTC* v. *Standard Oil Company*, 355 U.S. 396, 398 (1958); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 763 (D.C. Cir. 1964), *vacated and remanded*, 381 U.S. 739 (1955). It should grasp the present opportunity to protect buyers against Respondent's tightening squeeze on their bargaining rights.

4. *Respondent Does Not Dispel The Complete Failure To Accord Kroger Its Rights Under The Administrative Procedure Act And The Commission's Rules Of Practice.*

First, assuming *arguendo* that Commission counsel attacked Casserly's veracity before the Initial Decision, the challenge came too late. Respondent relies solely on a "reply memorandum filed with the hearing examiner two months prior to his initial decision" (Opp. 16-17). This was filed on July 21, 1967, exactly four months after the last hearing day and simultaneously with Kroger's reply.[17] Even if the issue had been raised before the hearing Examiner—which we deny—it was out of time (Pet. 23-25). This is confirmed by Respondent's inability to cite a single precedent supporting its position.

Second, the underlying recitals in Respondent's Brief rebut the claim that Casserly's veracity was put in issue before the Examiner. These recitals are (Opp. 17):

> "with respect to the alleged 20 percent Broughton discount, '[i]n actuality, an examination of this Broughton proposal shows that it did not offer a *uniform 20% discount* and that the prices offered Kroger in this proposal were *substantially higher* than those granted by Beatrice'."

[17] Appendix below, Volume I, pp. ix-x (lodged with the Clerk of the Court).

But the compelling facts are that Casserly had never testified that Broughton offered "a uniform 20% discount,"[18] and no one doubted that Broughton's discount prices "were substantially higher than those granted by Beatrice." The issue was whether *Fairmont's* prices were higher (FT:36-41). Particularly in light of Commission counsel's express support of Casserly in their proposed findings (Pet. 8), the quoted passage from their reply memorandum provided no notice that Casserly's testimony about the Broughton offer was disputed—as the Examiner's silence on the issue attests. The issue was first belatedly raised before the Commission (CA:11), but Respondent implicitly confesses that this was out of time, making no reference to it whatever.[19]

There is no more merit in the attempted defense of the complaint's neglect to put Kroger on notice either of the legal issue of potential independent 2(f) liability or of the factual issue concerning alleged misrepresentation of the Broughton offer. The sole citation in support of the complaint's sufficiency is a case decided on May 10, 1943 (Opp. 17).[20] That decision was issued three years before

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[18] Casserly meticulously avoided any description of the offer as "a uniform 20% discount". For example, on cross-examination by Beatrice's counsel, he testified (Appendix below, Volume II, at 299 (lodged with the Clerk of the Court)):

> "Q. Mr. Casserly, the first formal bid you received was from Broughton, isn't that correct? A. Correct.
>
> "Q. And the 20 per cent discount they offered you, do you recall whether— A. That was an average 20 per cent, Mr. Foote. It was a little above on some, a little below on others."

[19] Although it is not denied that "the Commission impeached Casserly" (Pet. 9), there is no defense of the failure to follow the Commission's impeachment rule (Pet. 26 n. 44).

[20] *A. E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454 (7th Cir. 1943). The court there emphasized that the parties "stipulate[d] all of the facts in this case" and emphasized that it was sustaining the administrative decision "under the circumstances of this case" (*id.* at 454-55).

the enactment of the Administrative Procedure Act on June 11, 1946. 5 U.S.C. (1970 Ed.), notes preceding § 551; 60 Stat. 237.[21] The notice deficiency of the present complaint is implicitly conceded by the contrasting particularity of the *A&P-Borden* complaint (p. 7 n. 12, *supra*).

CONCLUSION

For the reasons set forth in the petition and in this brief, a writ of certiorari should be granted.

Respectfully submitted,

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August 1971

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[21] We are baffled by the claim that Kroger knew that independent 2(f) liability was in issue, because of its objections to the admission against it of communications between Beatrice and Respondent and of internal Beatrice documents (Opp. 18). As the Examiner properly ruled, these were sheer hearsay as to Kroger (ID 155; Pet. 15 n. 25).

FEDERAL TRADE COMMISSION NEWS

WASHINGTON, D. C. 20580

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FOR RELEASE AFTER 8:30 A.M., Wednesday, June 2, 1971

PROPOSED RESTRAINT OF TRADE COMPLAINT ANNOUNCED AGAINST A & P AND BORDEN

A proposed Federal Trade Commission complaint alleges that The Great Atlantic & Pacific Tea Co., Inc., has knowingly induced discriminatory prices for dairy products sold in stores of its Chicago Division, did not give material information to the supplier which granted the price discriminations, and participated in a price-stabilization combination with the supplier, Borden, Inc.

The Commission announced its intention to issue a complaint under its consent order procedure against A & P, 420 Lexington Ave., New York City, and Borden, 350 Madison Ave., New York City.

According to the proposed complaint, A & P has entered into an agreement with Borden to supply milk and other dairy products, packaged under A & P's private label, to the majority of the approximately 260 stores of A & P's Chicago Division (Chicago Unit when the agreement was initiated). When Borden tendered its final offer, it informed A & P the offer was being granted to meet competition in the form of an existing offer or offers then in A & P's possession. A & P accepted Borden's offer knowing that Borden had granted a substantially lower price than the only other competitive bidder and without notifying Borden of this fact. Deliveries began under the agreement on or about November 1, 1965.

The complaint alleges that:

. Under these circumstances, A & P's failure to notify Borden that its offer substantially undercut the only other existing competitive bid violates the policy of the amended Clayton Act, and is an unfair practice or method of competition in violation of Section 5 of the FTC Act.

(more)

A & P violated Section 2(f) of the Robinson-Patman Amendment to the Clayton Act by knowingly inducing or receiving discriminatory prices which may substantially lessen competition.

A further allegation is that the conduct of A & P and Borden in connection with the private label agreement resulted in an anticompetitive combination, in violation of Section 5 of the FTC Act. The combination allegedly had the effect of (1) stabilizing and maintaining prices for milk and other dairy products, and (2) permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of the agreement with Borden.

For its part, A & P made sales at the prevailing retail price level for vendor label milk and dairy products despite the fact it was paying as much as 11 cents per gallon less for private label than for vendor (Borden) label milk, the complaint says. Thus, it sustained and maintained existing retail prices and did not pass on to the consuming public any of the substantial price savings given it by Borden. Borden, for its part, failed to pass on, at the wholesale level, similar price reductions to A & P's competitors in the Chicago market areas.

In addition to halting the alleged practices, the proposed order states that if record facts show that the proposed provisions "might be inadequate fully to protect the consuming public, or the competitive conditions of the retail grocery or dairy industries, the Commission may order such other relief as it finds necessary or appropriate, including restrictions on specific abuses of buying power in bi-lateral negotiations, restrictions on the use of the competitive bidding process, requirements that special price reductions be passed on to the consumer and to competing retailer-purchasers, the posting or publication of net wholesale prices to A & P, and restriction of vertical integration by A & P into the dairy industry if it appears any such provision is necessary or desirable for effective relief herein."

The respondents have been given the opportunity to advise the Commission whether they are interested in having the proceeding disposed of by the entry of a consent order.

(NOTE: The Commission issues a complaint when it has "reason to believe" that the law has been violated. Such action does not imply adjudication of the matters alleged.)

DETERMINATION TO
ISSUE COMPLAINT
(File No. 671 0149)

###

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and BORDEN, INC., a corporation.	DOCKET NO.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. Section 13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York 10017.

PARAGRAPH TWO: Respondent A & P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 states of the United States, the District of Columbia and in Canada. Respondent A & P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over $5,436,325,000.00 and for the fiscal year ended February 28, 1970, they totalled $5,753,692,000.00.

Included among A & P's retail grocery chain stores are approximately 260 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A & P. This Division was formerly identified as the Chicago Unit of A & P's Middle Western Division.

PARAGRAPH THREE: In the course and conduct of its business, respondent A & P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A & P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A & P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

The aforesaid sellers are located in the various states of the United States, and respondent A & P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A & P's retail stores and warehouses located in the same state and various other states of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A & P.

PARAGRAPH FOUR: Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York 10017.

PARAGRAPH FIVE: Respondent Borden is a holding and operating company having on December 31, 1969, a 100% voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to approximately $1,740,184,687.00 in 1969 and approximately $1,827,341,000.00 in 1970.

PARAGRAPH SIX: Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the states of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PARAGRAPH SEVEN: In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other states of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH EIGHT: Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PARAGRAPH NINE: In the course and conduct of its business in commerce, respondent A & P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A & P's own private label, to the majority of the stores of A & P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A & P or peculiar to the retail operations of A & P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PARAGRAPH TEN: The aforegoing act and practice of respondent A & P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

Count II

PARAGRAPH ELEVEN: Paragraphs One through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: In the course and conduct of its business in commerce, respondent A & P has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A & P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A & P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A & P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PARAGRAPH THIRTEEN: When respondent A & P knowingly induced or received the discriminatory prices from its supplier, as alleged, A & P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH FOURTEEN: The aforegoing acts and practices of A & P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Count III

PARAGRAPH FIFTEEN: Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH SIXTEEN: During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A & P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A & P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A. D., 1971, issues its complaint against respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the day of A.D. 19 , at o'clock is hereby fixed as the time and

as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

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NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the day of A.D. 19 , at o'clock is hereby fixed as the time and

as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed provisions as to The Great Atlantic & Pacific Tea Company, Inc., and Borden, Inc., might be inadequate fully to protect the consuming public, or the competitive conditions of the retail grocery or dairy industries, the Commission may order such other relief as it finds necessary or appropriate, including restrictions on specific abuses of buying power in bi-lateral negotiations, restrictions on the use of the competitive bidding process, requirements that special price reductions be passed on to the consumer and to competing retailer - purchasers, the posting or publication of net wholesale prices to A & P, and restriction of vertical integration by A & P into the dairy industry if it appears any such provision is necessary or desirable for effective relief herein.

IT IS ORDERED that respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the offering to purchase or purchase of any product, including fluid milk and other dairy products, in commerce, as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by respondent, forthwith cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price, unless said respondent shows that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of the differing methods or quantities in which it purchases such product, or said price was granted to it by the supplier to meet a lawful, equally low price of a competitor.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the purchase and resale of any product, including fluid milk and other dairy products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly entering into a combination, agreement or conspiracy which has the tendency or effect of fixing, stabilizing, maintaining, or sustaining the price of such product in any market area, at any market level.

IT IS FURTHER ORDERED that respondent Borden, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the sale of fluid milk or other dairy products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly entering into a combination, agreement or conspiracy which has the tendency or effect of fixing, stabilizing, maintaining, or sustaining the price of such product in any market area, at any market level.

IT IS FURTHER ORDERED that each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect its compliance obligations arising out of the order.

IT IS FURTHER ORDERED that each respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this day of , A. D., 1971.

By the Commission.

S E A L

Charles A. Tobin,
Secretary.